STATE
versus
PRINCE CHIFAMBA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 3, 4 & 7 July 2017

Criminal Trial

ASSESSORS: 1. Mr Barwa
2. Mr Gonzo

B Murevanhema for the state
P Matsanura for the accused

TSANGA: The accused was charged with murder in that on the 5th of October 2015 at 3377 Chibuku Industrial Area, he unlawfully and with intent to kill stabbed Lesley Motsi with an Okapi knife on the throat causing injuries from which the said Lesly Motsi died.

The essence of the state's case was that on the day in question the accused and the deceased had been drinking beer at a night club known as *Mzansi Fo Sho* in Kadoma in the company of Courage Manyamba and Raphael Mutesva. Whilst at the night club the accused and the deceased had a misunderstanding. After a short period at the night club they had all gone home albeit separately as they stayed together. The accused had reignited the issue of his misunderstanding with the deceased that he had had at the night club and had called him outside to solve the issue. Soon thereafter a loud scream had been heard by Raphael who had remained inside and had gone out to check. He had found the deceased lying on the ground with a cut on his throat. The accused had fled from the scene. A taxi had been arranged to take the deceased to hospital where he was pronounced dead on arrival. A post mortem report showed that he had died from the stab wound.

The accused denied that the stabbing was intentional. His defence outline was that the misunderstanding had arisen as a result of a loan of $50.00 which he had given the deceased sometime in September 2015. On the fateful day he had asked the deceased for the money

having observed him drinking with gay abandon at the night club yet he had still not repaid the loan. They had a misunderstanding at the bar and the deceased had arrived home before him that day and he had asked him why he had assaulted him. A scuffle had ensued. The accused had picked up a knife which was on the table and had gone out of the room with the deceased who was standing at the door. The deceased had opened that door for him. The deceased had followed him outside and had according to the accused, assaulted him with an iron bar on the back of his head as well as his forehead. He had fallen down and the deceased had continued to attack him. It was then that in an effort to ward off the attack that he had indiscriminately thrust the knife at the deceased without any idea of where the knife would stab him. The attack had ceased and the accused had asked him for a cigarette whilst pronouncing that he had been injured by the accused. The accused had instead left the scene and had gone to his parents' home in the rural areas. He had been troubled by what had occurred. He had met his cousin one Bernard Mapuranga whom he had told him that he had stabbed someone. He had surrendered the knife to Bernard who in turn had also surrendered it to the accused's father who had then buried it. The accused had thereafter gone to Marondera to stay with his friend Munyaradzi, a builder. He had advised Munyaradzi after about five months what had happened and the latter had gone to the police.

The exhibits

The knife used by the deceased was admitted by consent as exh 1. The post-mortem report by Dr Maurice Gonzalez which showed that the accused died of hypovolemic shock, aorta artery (ascendant) damage from the stab wound was admitted in evidence as exh 2. The affidavit of Dr Guvava who examined the body of the deceased on the 5th of October and pronounced him dead was also admitted by consent as exh 4. The evidence of the pathologist Dr Gonzalez as well as that of Dr Guvava was also admitted in terms of s 314 of the Criminal Procedure and Evidence Act negating the need for them to give their evidence in person.

Also admitted as exh 3 by consent in terms of s 256 of the Criminal Procedure and Evidence Act was the accused's warned and cautioned statement which he made in Shona and which was translated into English. Accused's counsel expressed preference for the accuracy of the Shona version given a variation in translation in the English version relating to his thought process on killing the deceased. In essence, in the warned and cautioned statement the accused understood the caution. He admitted to killing the deceased on the day in question following a dispute over $50.00 which he had loaned the deceased. In it, he said

the deceased had started assaulting him outside and he had thought of stabbing him. He had killed him. He had stabbed him on the shoulder. The deceased had asked him to look for a cigarette. The accused had gone to Mubaira and had given the knife to Bernard Mapuranga and had then proceeded to Marondera.

The admitted evidence

There were 8 witnesses lined up in this matter. Save for three witnesses who gave their evidence in person the evidence of five of the other witnesses was not in dispute and was admitted by consent in terms of s314 of the Criminal procedure and Evidence Act [*Chapter 9:07*].

The evidence of Professor Manyamba was that on the day in question the accused had come to his house at around 2am asking for shoes on the pretext that he had left his shoes at the night club. He had helped himself to a pair of rafter shoes and had gone away. The evidence of Isiah Chifamba the accused's father who resides in Chinengundu village was that on the 5th of October the accused had met Bernard Mapuranga (his nephew) who had been told by the accused what had happened and had given him the knife. The witness had been given the knife which he had buried a meter from the house. He had made arrangements to send his wife to Kadoma where they paid $150.00 for the burial of the deceased. The police had come to his homestead on the 6th of October to arrest the accused who by then had escaped to an unknown destination. The fact that the accused had used a knife which had been handed to his father and that the knife was later recovered was therefore not in dispute. The fact that the accused had escaped to an unknown destination at the time was equally not in dispute.

The other admitted evidence was from the members of the Zimbabwe Republic Police. Ernest Gwature, Jabulani Shave and Cephas Mutsvedu. Ernest Gwature had received the report of the murder and had gone to the scene and made observations of blood stains on the pavement outside the house where the deceased had met his fate. He had also gone to the hospital and observed the deep cut on the deceased's body. His evidence therefore confirmed that the accused had stabbed the deceased on the neck, consistent with the use of the knife which had been handed over to the accused's father.

Jabulani Shava was the Investigation officer. He had gone to arrest the accused at his rural home but had been told that he had escaped to an unknown destination. The accused father had dug out the knife from where he had buried it. In March 2016 after the accused had

been arrested, he had recorded the warned and cautioned statement from the accused. On 8 April 2016 the accused had made indications from which a sketch plan had been drawn.

Cephas Mutsvedu was the police officer who had in March 2016 received information from an informer that his assistant builder, the accused had a murder case and was wanted in Kadoma.

The State's Oral Evidence

Raphael Mutesva: The State led oral evidence from Raphael Mutesva who lived with both the accused and the deceased. They also worked in the same precinct. On the night in question they had gone drinking at *Mzansi fo Sho* night club. He had arrived home in the small hours of the morning of the 5th followed by the accused. On accused's arrival he had enquired from the deceased about an assault on him at the night club. A scuffle and fist fight had ensued between the deceased and the accused which he unsuccessfully tried to quell. The accused had then said to the deceased that they should go outside to talk and finalise the matter. Shortly upon their leaving the room he had heard a noise from outside and had followed. There he had found the deceased lying on the ground with the accused nowhere to be found. He had gone inside to advise his other roommates Courage Manyamba and Simbarashe Nzilo on this finding. They had called out the deceased's name but he was unresponsive. A taxi had been sought to ferry the deceased to Kadoma hospital where the deceased had been pronounced dead on arrival. Immediately thereafter a report had been made to the police and together with the police they had gone back to the scene. Blood had been observed where the deceased had been lying and nothing else had been observed.

His evidence was that the time between the accused leaving the house and the resultant scream had been so short that in his view it was unlikely that the deceased and accused had fought outside. He identified the knife as one that he had seen in the house they stayed and said the knife belonged to the accused Prince Chifamba as he had once seen him with it. He had however not seen the knife on the day in question. In cross examination he conceded that he could not say for sure that the knife belonged to the deceased. The knife used was itself not in dispute.

On the bone of contention between the accused and the deceased, he had only heard the accused stating that he had been assaulted by the deceased whilst at the night club. He had however not witnessed this incident at the club nor had he seen what had happened when the accused and the deceased went outside. He was resolute however on the speed within which

the incident leading to the scream had happened upon leaving the house. In cross examination when asked if the fight could have been about a loan he stated that neither the accused nor the deceased had ever mentioned a loan but he could not deny its possibility.

Courage Manyamba: who also stayed with the accused and the deceased also gave evidence. He is related to the accused who is his first cousin. He corroborated the first witness's evidence about the fight at the house and that it was accused who had stated that deceased and he should go outside to resolve their dispute. He too had not witnessed the events outside the house and therefore could not comment on the alleged possibility that the deceased had assaulted the accused with a metal bar. He however, told the court that there were no pieces of metal at the house they stayed but disused vehicle shells as they would sell all metal once the vehicle had been stripped. He had also not witnessed any dispute between the accused and the deceased whilst at the night club. However, he equally corroborated the evidence of the first witness, Raphael Mutesva, that it was within no time at all upon the two stepping outside the incident in question had occurred when Raphael in response to a scream had gone outside to find the deceased motionless. He had not seen the knife before and told the court that they did not cook in the room. He was of the view that the accused and deceased were of equal stature in relation to the possibility of the deceased having overpowered the accused.

In cross examination this witness was challenged on the authenticity of his statement that the accused had summoned the deceased to go outside when in the summary of his evidence to the police he had said the accused pushed the deceased outside. This was a minor variation which could easily have emanated from the recording of the statement. The witness had an opportunity to tell the court in person what exactly transpired and clarified that it was the accused who invited the deceased outside and that there had been pushing. He was also challenged on the issue of who exactly had gone to fetch the taxi as he had told the court that it was Raphael who went to look for a taxi when Raphael had in fact said that it was this witness and Simbarashe Nzilo who had gone to look for a taxi. His explanation was that his memory may have failed him. A year had passed since the traumatic incident. What was significant was that a taxi had been sought on an urgent basis and this was not in dispute.

Both witnesses who had been at the house on the fateful night gave a straight forward account of what had transpired. The fact that the second witness's memory may have been clouded on who went to fetch the police was in our view not material to the case and in no

way altered the authenticity of his evidence is particularly as it was not in dispute that a taxi had been fetched.

Bernard Mapuranga: who is a cousin of the accused also gave oral evidence. He had met the accused a day after the killing when he was visiting the accused's father who is his uncle. He had been told by the accused that he was troubled by an offence he had committed in that he had killed someone with a knife. He had also been told by the accused that the dispute had been over gold which the accused said that the deceased wanted to take away from him. The accused had surrendered the knife he had used to him and he in turn surrendered the knife to the father of the accused. He had also urged the deceased to surrender as it appeared to him from the conversation that the deceased wanted to run away. He stated that he had not observed anything on the accused on that day that suggested that he had been assaulted on the forehead. He identified the knife in question in court save that at the time that it was handed to him it had had blood stains.

The accused's evidence.

The accused took to the stand. He reiterated the version of his defence regarding the loan to the deceased and the squabble at the night club about his enquiry about the loan. This had taken place outside and the deceased had assaulted him. He had not retaliated for fear of being overpowered. At home he had indeed enquired about the assault and they had started fighting and Raphael had indeed tried to intervene. He said he had fallen on the table during this assault and had then picked up a knife which was on the table intending to frighten the deceased who was assaulting him with fists. He had thought that if the deceased saw the knife he would be afraid. He had indeed gone outside and had closed the door behind him. The deceased had followed him and had assaulted him on the back of his head and on the forehead with an iron rod from the scrap yard. He had fallen to the ground and the deceased had landed on him. He had then used his knife indiscriminately not knowing where he was aiming at. There was no one outside at the time who had witnessed the event.

He had proceeded to his rural home in Mhondoro that same day. He had spent the night in the bush having been afraid to go home because of what he had done. The following morning he had gone to the homestead and had told his family what had transpired. He had also told them that he wanted to leave and go to Marondera to stay with his friend. On that day whilst in the bush where he had gone to retrieve the knife, he had met Bernard Mapuranga who had come to visit his father whom he had related to what had occurred. He

had indeed given the knife to him. He had thereafter proceeded to Marondera. After five months he had phoned one Tongai who told him the deceased had died and he had related this fact to Munyaradzi whom he was staying with. He had asked Munyaradzi to accompany him to the police and that it was how he had come to surrender himself.

Factual and legal analysis of the evidence

The state argued that it had proven its case beyond a reasonable doubt in terms of s 47 (b) of the Criminal Code (Codification and Reform) Act [*Chapter 9: 23*] in that realising that there was a real risk or possibility that his conduct may cause death, the accused had continued to engage in that conduct despite the risk or possibility. The defence on the other hand argued that the state had failed to prove its case beyond a reasonable doubt.

It was not in dispute that no one had witnessed the events outside the house when the stabbing took place. However as regards accused's self defence argument, the first witness Raphael who had been instrumental in quelling the fight was unequivocal that the piercing scream he heard had been virtually instantaneous to the time the accused and the deceased had stepped outside. The second witness, Courage, also spoke to this spontaneity in the time frame. If the incident happened as quickly as the two witnesses who gave oral evidence stated, our finding was that there was no time at all for the deceased to have fetched the metal bar in question to assault the accused. There was no evidence from any of the witnesses or the police who visited the scene that they had recovered any metal weapon that could have been used to assault the deceased. One would have expected that the metal rod used which the accused himself described as having been at least a meter in length and having the thickness of a middle finger would have been there at the scene of the crime, more particularly where the deceased had met his demise. It would have been conspicuous yet nothing of that sort had been found at the scene.

Furthermore, the accused in his warned and cautioned statement did not at all mention that he had been assaulted by the deceased with a metal rod. He simply said there was fighting outside. If he had been assaulted with a metal rod this would have emerged very clearly at the time that he gave his statement and more specifically even before that when he narrated the ordeal to his father and to Bernard Mapuranga. The fact that he had primarily acted in self-defence would have been a thread of his story from the very onset of his narrative of events. It was not. Our conclusion is that this element of his defence that he had

been assaulted with a metal rod was clearly a recent fabrication. Whilst the accused showed the court a tiny scratch on his forehead which was less than half a centimetre as evidence of that assault this court had no way of proving that it was indeed from an attack which occurred on the day in question especially in the absence of a rod to corroborate his claim.

In any event if the deceased had used force as alleged by the accused one would have expected the injury to have been visible on the day he met Bernard Mapuranga. As the state also pointed out in its cross examination if force was used to the back and the front of the head one would have expected not only injuries but that the accused would have been rendered unconscious. Accused himself conceded that if indeed force had been used as he alleged one would have expected a visible swelling or even a fracture. These were conspicuously absent.

Therefore in dismissing that evidence that the accused was defending himself from an attack we were cognisant not only of the stark lack of evidence of the weapon allegedly used by the deceased in the attack but also of the fact that a key state witness, Bernard Mapuranga who had seen the accused the day after the killing had not detected anything unusual on the deceased's face that day. What he had simply observed was that the accused was extremely nervous and disturbed. Indeed if he had been attacked by the deceased with a metal rod this was a material fact he would have told him this material fact in relating his story. Instead he related a story relating to a dispute about gold as being the gravamen of the dispute and his use of a knife in resolving that dispute. The accused's version was palpably improbable because the metal rod would have been found were his story true. The accused's response in cross examination that there was scrap metal all over and therefore the police could not have known which on was used was not supported by the evidence of the state witnesses. The evidence of Courage Manyamba in particular was clear that there was no scrap metal but vehicles as they would get rid of all the metal once they had stripped a car and would sell it. No witness spoke to the yard being littered with scrap metal. We reiterate, if a bar had been used it would have been found where the deceased's body had lain when the police came.

The accused said he picked up the knife to threaten the accused yet there was no evidence from him as to how he alerted the deceased to the threat. The accused must have had the knife on him at the time as none of the witnesses reported seeing the knife on the table as alleged by the accused. The accused's version of having been assaulted and fallen on to the table where there was a knife was not at all put to the witnesses by accused's counsel. If the accused had picked up a knife for all to see and had gone out of the room first closing

the door, then what is probable is that the others would simply have locked the door after him in the face of such danger.

There was no evidence that once the parties got home the deceased had been the primary aggressor. The two key witnesses said it was the accused who had raised the issue of his earlier assault. The fact that it was accused who said the deceased and himself should go outside was significantly not challenged by the accused when the witnesses gave this evidence. The defense of provocation cannot hold as the moment at the night club had passed and it cannot be said that the accused faced consistent provocation by any stretch of the imagination. In fact everyone was ready to sleep when they got home.

The state also argued that the accused had departed materially from his defence outline that the court was entitled to make adverse inferences. (*S* v *Mhandwe* 1993 (2) ZLR 233). It is true that the warned and cautioned statement did not mention any assault with an iron bar at all. As stated this was a material issue to his defence which ought to have been mentioned in no uncertain terms.

Accused's version as to how he had come to surrender himself was at variance with that of the police officer who had arrested him and which was admitted in evidence by consent. The accused was therefore not being honest with the court regarding the fact that he had voluntarily surrendered. In any case it boggles the mind why he could not have surrendered earlier if he had no intention of killing he deceased as he says. If indeed the deceased spoke to him after the assault then he should have remained to render assistance. There were also discrepancies in the reason for the fight which he told his cousin Bernard Mapuranga a day after the fatal attack and the reason he then gave in his warned and cautioned statement and his defence outline several months after the incident. The propensity for inconsistent evidence was apparent therein.

It was not in dispute that there had been drinking on that day but none of the witnesses including the accused himself were so drunk as not to have been in control of their faculties. Raphael was sober enough to quell the fight. The other residents had been sober enough to seek help after the incident and to make the necessary report to the police. The accused was sober enough to realise the gravity of his offence and to put in immediate motion a plan for his escape.

As regards his intention in inflicting the stab wound the case of *Mugwanda* v *The State* 2002 (1) ZLR 574 S makes the observation that:

> "It is not an easy task to determine an accused's *mens rea* in a case such as this one where a single stab wound inflicted to a vital part of the body results in death"

However, using the approach set out *S* v *Sigwahla* 1967 (4) SA 556 (A) the court emphasized the sufficiency of accused subjectively foreseeing the possibility of his act causing death and remaining reckless as to the result. Drawing on the *Sigwahla* case:

> "To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so".

It cannot be said that the accused did not foresee the result of his actions. Looking at the factual matrix, he was the one who had reignited the dispute upon arrival home if we accept his evidence that the deceased had assaulted him at the night club. Indeed it is also material that it was him who said they should go outside. Furthermore, he clearly admitted in his warned and cautioned statement to formulating an intention to stab. The fact that he left the room and closed the door would mean that he had every opportunity to disengage himself from the implosive situation if that was his intention. There was no threat to life and limb. There was no evidence that he had alerted the deceased to the fact that he had a knife in order to frighten him as he said. He knew what he intended to do and proceeded to do so regardless of the consequences of his actions. Whilst bearing in mind that the reasonable apprehension of danger is from the perspective of the accused, there was no evidence that the accused apprehended danger to himself in the form of the weapon that the accused said the deceased had used on him. The accused himself told the court that he had not removed any weapon from the scene. He wanted to exact revenge on the deceased for assaulting him. There was a realization of the risk involved in stabbing him and he had proceeded nonetheless. He had fled soon thereafter confirming that realization.

The court accordingly reaches the following verdict:

The accused is found guilty of murder in terms of s 47(1) (b) of the Code in that realising that that there was a real risk or possibility that his conduct may cause death, he had continued to engage in that conduct despite the risk or possibility.

Reasons for sentence

In mitigation, it was averred that the accused is a first offender, married, and is a father to a three year old. He also takes care of his 69 year old father and his 54 year old

mother. It was further stated that he had shown remorse in that he admitted to the stabbing. He was 27 at the time of the offence. He had also been in custody for over a year since April 2016. Relying on *S* v *Shariwa* 2003 (1) ZLR 314 (H) it was put that the punishment should suit the circumstances of the crime and that it should also be individualized. See also *S* v *Manyevere* HB 38-03. It was further put that the sentence should allow him to lead a normal life again. *S* v *Pamela Homela* HB 214-15. Counsel urged for a sentence of 10 years under the circumstances.

In aggravation the state pointed to the seriousness of the offence regardless of the fact that it was indeed a first offence. Whilst acknowledging that there were no aggravating circumstances and whilst noting the personal circumstances of the accused, the state equally highlighted the reality that the deceased family had lost a bread winner and would never get him back. As regards remorse, it was the accused's family as opposed to the accused himself who had been of assistance with the deceased's funeral. The state urged for a sentence in the region of 15 years.

Taking into account that the accused was 27 years old when he committed the offence and that the murder was not aggravated but arose from recklessness as to the result, this court is of the view that a sentence that metes out punishment but at the same time allows the accused to be rehabilitated should be imposed. He will have to live with the knowledge that he killed his friend. A sentence which in this case takes fits the criminal as well as the crime and is fair to the accused and to the state whilst showing a measure of mercy is 12 years imprisonment.

The accused is accordingly sentenced to 12 years imprisonment.

Prosecutor General, state's legal practitioners
Muvingi & Mugadza, accused's legal practitioners *(Pro-Deo)*