STATE
versus
CARRINGTON CLIPTON GWERA
and
AGRIPPA CHIBISO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16, 17, 18 October & 9 November 2017

ASSESSORS : 1. Mr Kunaka
2. Mr Chivanda

Criminal Trial

A Muzivi, for the State
G Nyandoro & MF Makore, for the 1st accused
P Mazhata, for the 2nd accused

TSANGA J: Both accused persons in this case are charged with murder which had its genesis in a request for a cigarette by the deceased, one Moses Chiyangwa. This request was to one Joseph Mutonhodzi, a reveller at the bar who was the first accused, Carrington Gwera's friend. They had been drinking at the bar till the early hours of Saturday 16th of April 2016, when the unwelcome request was made. Following a sequence of events as more fully detailed herein, the deceased had suffered a stab wound at the hands of the first accused. The infliction of the fatal wound was said by the State to have been aided and abetted by the actions of second accused, Agrippa Chibiso, who had pulled the deceased to the ground by holding both his ankles thereby facilitating the attack by making him vulnerable. Both pleaded not guilty.

The first accused relied on the defences of self-defence and intoxication whilst the second accused denied ever being at the scene at the actual time of the alleged attack or incapacitating the deceased by pulling his legs. The first accused person is a nephew to the second accused's wife. He says he brought him up as his own son following the death of his mother.

The state's evidence

According to the state outline, upon being denied the cigarette the deceased had slapped the said Joseph before proceeding home thereafter. The evidence of the state's sole witness, Mickey Adan, the widow of the deceased, was that shortly after the deceased arrived home from his all night sojourn, her son had come knocking at their bedroom door and announced that two men were outside looking for the deceased. The two men looking for him were the first accused person, Carrington Gwera and his friend Joseph Mutonhodzi who had been slapped earlier that morning.

The deceased had responded to the call and had gone outside whilst holding his child. Joseph Mutonhodzi had then slapped the deceased who had proceeded to put down the child he was carrying. He had slapped Joseph in return resulting in the latter retreating into an open maize field and disappearing from the scene. The deceased had then asked the first accused what he wanted and had advanced towards him. The first accused had walked away back to the shops towards an avocado tree where the second accused, his uncle, Agrippa Chibiso was standing or waiting. The widow had followed them at a close distance.

Thereafter whilst they were engaged in some conversation which she said she could not hear, the two accused persons and the deceased had advanced towards the tarred road with the deceased in the middle. It was at that point that the second accused, Agrippa had held the deceased by both his ankles resulting in him falling down. The first accused had reached into his pocket and pulled out a knife which he then used to stab the deceased in his chest. In shock and horror the witness, that is the deceased's wife had rushed to the three men and had tried to grab the knife from the first accused who was about to strike a second blow. She had screamed that her husband had been stabbed but nobody had come to stop the fight save for one Planmore Makore, a friend of the deceased, who arrived after the deceased had been stabbed. The first accused had closed the okapi knife whilst the second accused had chided her for stopping the fight whilst proclaiming that his son, with reference to the first accused, had been brought up to stab. Thereafter, the two accused persons are said to have held their hands together and raised them up in the air in a congratulatory manner, with the second accused proclaiming that his son was good at stabbing. They had then proceeded down the road.

After Planmore's arrival the deceased had risen from the ground and walked a few meters but had fallen down. He had gotten up and again tried to walk but had again buckled to the ground. This time he had not risen. A motor vehicle had been sought to ferry him to hospital but he was dead on arrival.

The first accused's evidence

The first accused gave a different version of the unfolding of that morning's events. He denied ever going to the deceased's house with Joseph to follow up on the earlier assault that had been perpetrated on the latter. Whilst a cigarette had indeed been requested and refused, his version was that it was the deceased who had gone home and had come back with an axe handle and had struck Joseph who had beat a path into the maize field. Thereafter, the deceased had tried to turn the axe handle upon the first accused. He did not explain why he was targeted. He said he had run away but because of his inebriated state had not gotten far when the deceased caught up and had managed to strike him with the said handle on the forehead and on his nose bridge. Four men from a crowd which had gathered, had tried to restrain the deceased but he said they had failed. Thereafter the deceased had advanced towards the first accused with a knife and the accused had picked up that knife which the deceased had dropped and had decided to protect himself by stabbing the deceased. He did not know that he had stabbed him on a delicate part of the body.

The accused told the court in the same breath that the knife had been dropped by the accused at the point when he was being restrained by the four men. It was therefore difficult to understand how the deceased could have been advancing to him with a knife which he had already dropped at the material time.

He denied that his uncle had been at the scene prior to the stabbing and said he had come thereafter after being called from a tuck-shop which serves as a bar where he was at the material time. His uncle had found him bleeding and had suggested that they go to the police to make a report. He denied seeing the deceased's wife at all at the scene that day. As regards the knife, his evidence was that after stabbing the deceased, he had thrown down the knife and had later boarded a car to the police station. He therefore had no knowledge of what had happened to the knife or the axe handle thereafter. His evidence was that the police had tried to get him to admit that the knife belonged to him but he had refused.

The second accused's evidence

The second accused's version was that the bar that he had been drinking at had closed in the early hours of that morning. He had met a friend near some banana trees along the road leading home and that is where he was drinking at the time he was called by Cliffmore, who is the first accused's elder brother, who told him the first accused had sustained injuries. He had found him bleeding from the nose. He had decided that they head to the police and once there it was him who had made the report. He dismissed the state witness's narration and version of his facilitative involvement in the attack as a fabrication.

THE LEGAL AND FACTUAL ANALYSIS WITH RESPECT TO THE 1ST ACCUSED

Factual findings

The accused's version that he had not gone to the deceased's house was not credible. We believed the widow's evidence as more probable than the version of the first accused. If the accused did not go the deceased's house as he says, then particularly striking is that no reasons were given as to why the deceased would have wanted to attack him. After all he was not the one who had refused him a cigarette. There was absolutely no reason why the deceased's widow would knit a yarn about the two having come to the house looking for the deceased or her own detailed account of witnessing the events thereafter. It was the first accused who had every reason to lie. We also believed her when she said the deceased had followed the first accused because he had come to his home. We also believed her that he was not armed with any weapon when he followed the first accused.

Whether the accused acted in self defence

One finds time and time again that the intention to protect one's self – in other words self-defence as well as the lack of intention to strike a vulnerable part or in other words lack of knowledge of the possibility of inflicting fatal harm, are generally put forward in cases of fatal physical encounters between an accused and a deceased. Much depends on the facts. Section 253 of the Criminal Code deals with self-defence. For self-defence to succeed the requirements are as follows:

(a) There must be an unlawful attack
(b) upon the accused or a third party where the accused intervened to protect that third party
(c) the attack must have commenced or be imminent;
(d) the action taken must be necessary to arrest the attack; and

(e) the means used to avert the attack must be reasonable.

Materially no evidence of an axe was found and the okapi knife too which the accused had used had also disappeared after its use. Joseph Mutonhodzi who was said to have been assaulted with the said axe was never called as a witness by the defence and no explanation was rendered. The first accused's argument that he acted in self-defence does not hold. Whilst we accept that the deceased did indeed follow the first accused after he turned up at his house, we do not believe he was carrying anything on his person when he did so. The accused's version that the knife belonged to the deceased lacks credibility as the deceased had already been in a confrontation twice that day and no point had he produced a knife. What he had done was to slap the accused's friend. Whilst the first accused may have had reason to fear being assaulted because he had been to the deceased's house and the deceased had followed him for so doing so, we did not find that he was under any specific attack as envisaged by the requirements in the relevant legal provision.

Whether the accused's cognitive faculties were affected by drinking

The accused also relied on the defence of intoxication. A state of intoxication can vitiate the necessary intention or recklessness required to commit murder if the accused's brain was numbed by the alcohol he had taken. The clear exception where intoxication is a full defence is where it is involuntary as envisaged in s 220 of the Criminal Law (Codification and Reform) Act[*Chapter 9:23*]. In terms of s 221 of the Criminal Code intoxication is no defence to crimes committed with the requisite state of mind. Murder, as stated, requires proof of intention, knowledge or realisation of the real risk or possibility of death. Materially where intoxication **whether voluntary or involuntary**, impacts on the requisite state of mind then such intoxication can be defence to a crime requiring proof of intention, knowledge, realisation or risk. The provision is worded as follows:

> **"221 Intoxication no defence to crimes committed with requisite state of mind**
> (1) If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility;
> (*a*) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
> (*b*) the effect of the intoxication was **not** such that he or she lacked the requisite intention, knowledge or realisation;
> such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed."

The *onus* as can be deduced from this provision, is on the accused to demonstrate that the alleged intoxication was such that it rendered such person incapable of forming the requisite intention to commit the offence of murder. The court's conclusions on the effects of the intoxication on intention, or knowledge or realisation, rest on the evidence that is placed before it. If the intoxication, from the evidence presented, does not affect intention or cognitive abilities then it is simply not a defence though as the provision states, it may be taken into account in mitigation.

Placing the burden on the accused to discharge the onus that they lacked intention or did not foresee the consequences of act because of intoxication makes sense for a number of reasons. Firstly, it is the accused who can speak to his or her condition at the time by placing before the court the necessary facts of their intoxicated at the time. This is in order for the court to assess the likelihood of its effect on the requisite intention, knowledge, or realisation. Secondly, with the very high number of alcohol related homicides that the criminal justice system is confronted with where intoxication is implicated, a provision couched in the manner such as ours, at least reinforces the principle that criminal responsibility is the starting point for voluntary intoxication unless the court finds otherwise from the evidence.

Furthermore, as such intoxication induced homicides are associated with unnecessary loss of life and high costs to the criminal justice system, the threshold for convincing the court that inebriation impacted on one's senses is generally high with reason. (See *S* v *Muchemesi* HH 287 /15; *S* v *Nziradzafa* HH 325-15; *S v Sibanda* HB 104-11 all which rejected the intoxication defence. See also *S* v *Mutendera HM 02-17* where the defence was allowed. Simply put, the starting point is that a person who had the choice whether to become intoxicated or not, should face the consequences unless this can be rebutted.

In casu, whilst we accept the evidence that the first accused had indeed been drinking, the accused did not in our view demonstrate that the alleged intoxication rendered him in capable of appreciating what he was doing and the risks involved. We are merely told that he had been at the bar the whole night and had been drinking. Spending the night at a bar drinking is in itself not unusual in this society particular among men. There are people who for whatever reason, may choose to spend a night at a bar instead of the comfort of their home, and yet may consume alcohol without impacting on their cognitive abilities. As such the mere assertion that the night has been spent at bar is in itself not the indicator of uncontrollable or numbing drunkenness. We are not told how much or what it was he consumed. The court cannot go by his mere say so that he was so drunk as not to have the

requisite foresight. He had the onus of proving so. In our view, for the accused to take such an active interest in matter which really had nothing to do with him, he must have been driven not just by a sense of loyalty to his friend but more significantly by his own state of invincibility no doubt fuelled by the absence of inhibitions merely loosened by drinking.

We found that whilst he was in all probability intoxicated there was no evidence from the totality of the circumstances to show that he did not appreciate what he was doing. He was clearly sufficiently aware that he was carrying a knife and to do away with the murder weapon or to be coerced into doing so. Following someone to their house to exact revenge is not the action of people who do not know what they are doing. Whilst both accused persons had been drinking their evidence was that they had also been able to fall asleep at the bar so it was not as if they were both drunk and sleep deprived. In this instance, the taking of alcohol simply acts in mitigation in terms of s 221 of the Criminal Code [*Chapter 9:23*]. In this regard, according to the case of *S* v *Kamusewo* 1988 (1) ZLR 182 (SC) there is no defined degree of intoxication that must be demanded before intoxication can serve as an extenuating circumstance.

Whether death was foreseeable

Section 47 of the Criminal Law Code defines murder as follows:

> **"47 Murder**
> (1) Any person who causes the death of another person
> (*a*) intending to kill the other person; or
> (*b*) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility."

The criminal code is clear that just as a murder can arise from a conscious objective to achieve that murder it can also arise from recklessness in whether any conduct on the part of an accused achieves the result or not. Where a mental state of knowledge, risk, indifference and recklessness is shown to exist then, there is no reason why the indifferent killer should not be found liable for his conduct. Besides his defence that he was trying to protect himself, the accused raised the issue that striking the deceased in the chest as he ultimately did, was not even in his realm of possibility at the time as his intention had been to strike him in the arm. The critical issue is whether the facts of the case point to indifference as to the consequences of using a knife on the deceased.

Whilst the evidence in this case rebuts the specific type of intent as captured in s 47 (1) a (a) of the Criminal Code, which specific intent *Black's law dictionary* defines as "[t]he

intent to accomplish the precise criminal act that one is charged with" the issue is whether the evidence points to knowledge that death was a possibility and recklessness as to the outcome, what it puts into issue is the issue of foreseeability and recklessness. In other words, in circumstances such as this where the accused is involved in a scuffle and resorts to the use of a weapon, the issue is whether the accused was aware of the probable danger of using a knife and continued with his act regardless of that danger.

Far too many young people are carrying dangerous weapons as their mark of invinsibility. Far too many seem to care less that the mixture of alcohol and a deadly weapon on their person is a catalyst for disaster when inhibitions are loosened by alcohol. Using a knife on someone shows indifference as to the result as the human body is extremely fragile to violence regardless of the part of the body attacked. The left side of the human chest housing the heart as it does is an even more so. In going directly for the left side of the chest in stabbing the deceased the first accused must have realised that there was a real risk or possibility that his conduct in using a knife against the deceased might cause death but nonetheless continued in such conduct despite that risk or possibility. Indeed the post-mortem report was clear that the deceased had died from haemorrhage as a result of the stab wound. We do not find any evidence to support the accused's assertion that his intention was to stab the deceased in the arm. In fact, the widow's evidence was clear that there was celebration at his ability to stab.

Verdict: Having dismissed the self-defence and intoxication defences and having reached the conclusion that the death was foreseeable, we therefore find the first accused person is guilty of murder with constructive intent.

LEGAL AND FACTUAL ANALYSIS WITH RESPECT TO THE SECOND ACCUSED

We turn now to the issue of the role of the 2nd accused. Factually, we found the second accused to be far from an honest witness. It boggles the mind why the second accused would take lead in the report itself at the police station if he had not witnessed the fight at all and had gotten there after the fight was over. His evidence was simply not credible. There would be no reason why the widow who was unknown to any of the accused persons would at that time have knitted a careful yarn of his involvement in the manner she detailed to the court. She was truthful at all times that the 2nd accused had not come to her residence. She was equally truthful that the deceased had indeed followed the first accused for coming to his

house. She was equally truthful that the first accused had headed to a tree where the second accused was. By the second's accused's own admission he was not inside any bar at the material time. He says he was under some banana trees whilst to the State witness said he was under an avocado tree. There may have been both an avocado and a banana tree but the fact remains he was under a tree. Materially, the evidence of Cliffmore Gwera, the first accused's brother, confirmed that widow's report from the onset whilst at the police station was that both accused persons had been present at the time the deceased was stabbed. That is the report she had made. In other words, she did not manufacture this on their way from the police as had been alleged that she said she was going to fix the second accused person.

We are inclined to believe the evidence of the State witness as she had no motive to lie against the second accused whereas he in our view had every motive to lie because of his involvement in the fight at the time of the stabbing. We are in no doubt that the events happened as described by the State's witness.

The critical issue is whether the second accused, in pulling the deceased's legs and dropping him to the ground, acted in common purpose with the first accused or even as an accomplice to the said murder. In terms of s196A(1) of the Criminal Code as amended in 2016, for one to be found as a co-perpetrator they must have the requisite *mens rea* to commit the crime. They must either have the intention or knowledge of the fact that a crime will be committed or must at the very least realise the risk of the crime in question being committed. Section 196A (2) sets out some of the relevant indicia of co-perpetration:

> "(2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they—
> (*a*) were present at or in the immediate vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or
> (*b*) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
> (*c*) engaged in any criminal behaviour as a team or group prior to the conduct which resulted in the crime for which they are charged."

Section 196A (3) on the other hand sets out that a person can be found to have acted as an accomplice instead of a co-perpetrator if the relevant facts are proved.

> (3) A person charged with being a co-perpetrator of crime may be found guilty of assisting the actual perpetrator of the crime as an accomplice or accessory if such are the facts proved.

When the second accused pulled the deceased by his legs he no doubt may have intended to place him at some disadvantage. As regards whether the second accused acted as a co-perpetrator, whilst we find that the second accused was present at the scene and that he did hold the deceased by his ankles thereby dropping him to the ground, we are not convinced that he was aware at all times that the first accused intended to use a knife against the deceased or that he pulled his legs so that the crime could be committed. There is no evidence of prior engagement as a team in preparation for the conduct in question. It was our finding that whilst the two accused were indeed present at the same time that in itself does not mean that the second accused therefore knew that a knife was going to be used and was nonetheless reckless as to its use.

We are not convinced that his conduct amounted to being an accomplice either. The principles as set out in the case of *S* v *Mumpande & Ors* 2014 (2) ZLR 417 (H) as to whether one is an accomplice are as follows:

> "The mental element of the liability of an accomplice is dependent on proof that he rendered assistance and that he had the intention to assist in the commission of the crime which was actually committed by the principal. The extent of the liability of the accomplice hinges upon his intention, actual or legal, in regard to what is done by the principal offender. The accomplice should be liable to be convicted of the same offence with which the principal is charged; facts must be present that show that the accomplice could also be convicted of that offence. A person does not become an accomplice merely by witnessing an act and taking no steps to prevent it.
>
> Two requirements must therefore be satisfied for a person to be labelled an accomplice: (a) there must be evidence that the person intended to aid or promote the underlying offence and (b) there must be evidence that the person actively participated in the crime by soliciting, aiding or agreeing to aid the principal".

Although his act of assault in pulling the deceased down made it easier for the first accused to attack him with the knife because he was now lying down and more vulnerable, as stated there is no evidence that he intended to promote murder. Granted the deceased might have been able to escape at the production of the knife by the first accused if he had not been lying in a vulnerable position as a result of the second accused's act of assault, but no evidence supports that that he had in any way acted with the intention of murder in mind. Whilst we find that indeed the two accused persons engaged in some form of self-congratulatory gestures following the stabbing, this appears to have been motivated on the part of the second accused in particular by sheer foolishness and a display of his lack of maturity as an adult rather than a celebration of a pre-planned attack against the first accused.

After all, if the deceased himself had not followed the first accused to the township, the second accused would not have come into the picture.

It is competent to convict of an offence other than that charged if the charge is one for which a competent verdict is provided by the Fourth Schedule to the Criminal Law Code [*Chapter 9:23*]. The second accused was in our view merely guilty of assault against the deceased. Where two persons are indicted for the same murder, it is very possible for one person to be found guilty of murder or culpable homicide whilst the other is merely found guilty of assault. This is in the absence of a finding of the accused having acted as co-perpetrators or that the other was an accomplice. In making a finding of assault much depends on the facts before the court and in particular the proof or rather failure of proof of intent to commit the more serious offence in question be it murder or culpable homicide.

Verdict: The second accused is guilty of assault.

<u>Mitigation and aggravation</u>

The first accused

This court takes into account the age of the accused who is 22 years and was 21 when he committed the offence. It also takes into account the fact that although the court found that he knew what he was doing, intoxication was a contributory factor to the tragic events that unfolded. In addition this court notes that the deceased followed the accused when he had in fact walked away. A dispute could have been avoided had he not done so. As regards the appropriate sentence it would indeed appear that in cases of murder with constructive intent where stabbing is involved the court generally imposes exemplary sentences to mark its displeasure at the unnecessary loss of life which the state emphasised as aggravatory in this case. In *S* v *Blessing Chimbirai* HH 558-15 for example, a 25 year sentence was imposed for murder with constructive intent arising from a stabbing. In *S* v *Chirwa* HB 112/15 the accused, aged 24, was sentenced to 15 years for murder with constructive intent also arising from stabbing. Ultimately though, the sentence must always suit the offender. Taking into account the accused's intoxication, his relatively youthful age and the fact that the deceased was partly responsible in following the 1st accused when he came to his house instead of letting the matter slide, the first accused is sentenced as follows: 12 years imprisonment.

The second accused.

The second accused's failure to tell the truth and to assist the court in knowing what actually happened and instead trying to get away with his involvement aggravates the nature of the assault on the deceased and the consequences that flowed therefrom. In this court's view, a sentence that will keep the second accused on the straight and narrow is called for. Far too many people are dying as a result of people's involvement in meaningless bar brawls and it is vital that consequences befall those who continue to think that they can drink alcohol to levels of stupidity and get away with the consequences of their bad behaviour. In the court's view, a fine as well as a short suspended custodial sentence is appropriate for the reason that the second accused was totally unremorseful and sought to cover up his role in the assault. He appears to be a person who strongly believes that he can get away with wrong doing by beating the system with his lies. That is not so. In sentencing him, this court has taken into account that he is a first offender and is a family man with six children five of whom are still minors. His moral blameworthiness is also on a far lesser scale having been found guilty of assault. In the result, the second accused is sentenced as follows:

> A fine of $150.00 or in default 3 months imprisonment. In addition, one year imprisonment wholly suspended for five years on condition that the accused does not during that time commit any crime involving assault or violence for which the accused is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, State's legal practitioners
Hamunakwadi & Nyandoro, 1st accused's legal practitioners
Machingura Legal Practitioners, 2nd accused's legal practitioners