

THE STATE
versus
SHELTER SACHOKA
and
TENDAI TAGARIRA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17, 18, 19 & 20 July 2017; 9 August & 29 August 2017

ASSESSORS : 1. Mr Msengezi
2. Mr Shenje

Criminal Trial

R Murevanhema, for the State
M Chirimuuta, for the 1st accused
T Maune, for the 2nd accused

CHITAPI J: The two accused persons are residents respectively of Zimbiru and Mungate villages under Chief Chinamhora. They were arraigned before this court on a charge of murder as defined in s 47 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The indictment against them alleges that on 31 January, 2016 around 2230 hours the two of them unlawfully and intentionally caused the death of one, Allan Katimba whom they manhandled and stabbed on the inner and upper elbow twice using a sharp edged broken bottle resulting in injuries from which Allan Katimba dies.

When the indictment was put to the 1st accused, she responded that she understood the charge. When asked what her plea was she responded, "I plead guilty". The court entered a plea of NOT GUILTY as it is necessary in terms of s 271 (1) of the Criminal Procedure and Evidence Act; [*Chapter 9:07*] that the State notwithstanding a guilty plea on a murder charge must still prove the charge against the accused person. The 2nd accused pleaded not guilty to the indictment.

Both accused persons filed defence outlines. The 1st accused admitted in her defence outline that she cut the deceased on his arm using an empty beer bottle and that she acted in

self-defence whilst under attack by the deceased. The 2nd accused in his defence outline admitted to having been inside Zimbiru cocktail bar and tried to restrain the deceased from assaulting the 1st accused whilst both the 1st accused and the deceased were in the cocktail bar. He outlined that the 1st accused and the deceased went outside. He did not follow them outside and did not witness what happened. In other words the 2nd accused denied being party to the stabbing of the deceased nor witnessing it.

To prove the death of the deceased, the State counsel produced by consent, the post-mortem report compiled by Dr Mauricio Gonzales, a forensic pathologist following his examination of the remains of the deceased on 2 February, 2016 at Parirenyatwa Hospital. He observed the deceased to have been a 25 year old male person measuring 184cm and weighing 80 kg. The deceased's body had some stab wounds which the doctor recorded as follows:

- Left scapular area – (4cm)
- Left arm (external area) – 3cm
- Left arm (internal area) 2cm

There were no other injuries observed on the deceased's body. The doctor concluded that the cause of death was hypovolemic shock secondary to brachial artery damage caused by stab wounds. When I accessed the internet on wikipedia.org/wiki/brachial-artery on 23 August, 2017, the brachial artery is described as “the major blood vessel of the (upper) arm. It is the continuation of the axillary artery beyond the lower margin of teres major muscle”.

The artery is the primary blood vessel in the upper arm and supplies blood to muscles of the upper arm and the shaft of the humerus. Further it supplies blood to the elbow joint, the forearm and the hand.

Hypovolemic shock on the other hand is on reference to the internet: medlineplus.gov/fency/article/000167htm accessed on the same date as I did when researching on brachial artery damage, described as “an emergency condition in which severe blood or fluid loss makes the heart unable to pump enough blood to the body. This type of shock may cause many organs to stop working.” The condition which is also called haemorrhagic shock can lead to rapid death if not attended to immediately and occurs once the body loses up to 20% of blood or fluid loss.

Turning to the facts of this case, the deceased therefore suffered a severe loss of blood because of the damage to his brachial artery. This loss of blood was rapid because a major blood supply artery was cut creating an emergency situation which required immediate medical attention. The loss of blood led to the starvation of the body of blood to the heart to be pumps

to vital organs of the deceased. Once starved of blood, the organs would stop functioning and the person dies. The above scenario therefore explains how the deceased died following the stab wounds inflicted by the 1st accused by her own admission, albeit allegedly acting self-defence.

As regards the 1st accused, the issue to be determined is whether or not when she stabbed the deceased and caused the injuries which resulted in his death, she was acting in self-defence. As regard the 2nd accused person, the issue for determination is whether or not he took part in the assault upon the deceased and if he did, whether or not he is liable with the 1st accused as a co-perpetrator or accomplice.

The State in support of its case led evidence from a number of witnesses whose evidence is dealt with in brief. The first witness was Tapiwa Gareta. He operates a disco providing entertainment in the form of music to patrons in Zimbiru Cocktail Bar. He testified to the presence of the deceased and the two accused persons inside the bar on 31 Januray, 2016 around 10:00pm. The three were part of several other patrons. He referred to 2nd accused as Madyira. No issue arises from the name reference as it was common cause that the 2nd accused was normally referred to by his totem, "Madyira". The witness observed an altercation between the 1st accused and the deceased. He first saw them pushing each other. The 2nd accused was also involved. The witness then saw the 1st accused holding the deceased by the collar. The altercation was taking place some 6-7 metres away from where the witness was and by the bar counter. There was electrical lighting in the bar.

The witness went to the scene of the altercation and restrained the 1st accused from manhandling the deceased. Shortly after restraining them, he realised that there were now a few patrons in the bar as the bulk of them had gone outside. He followed outside. He then observed the 2nd accused and another person holding the deceased by his hands. He observed the 1st accused to stab the deceased on the hand. There was blood oozing from the deceased's arm. He intervened and restrained the persons involved. He saw that the 1st accused was holding a piece of a broken bottle and it is the one which she used to stab or cut the deceased with on his hand. He testified that the 1st accused then ran towards the police station. He did not see what became of the 2nd accused. The witness observed the deceased to walk towards the bar and he then lay on the ground where some people were trying to stop the bleeding on his arm by wrapping material around the hand.

The witness described the 2nd accused person as having been heavily drunk. He could hardly walk straight and would stagger and move in a zig-zag manner. When the prosecutor

put the 2nd accused's version of events that the 2nd accused would deny involvement in the assault of the deceased on the basis that the 2nd accused had already gone home when the deceased was stabbed, the witness disagreed and said that the 2nd accused had been holding the deceased's hand at the time of the assault and the witness restrained him. The witness did not dispute the 1st accused's version when the prosecutor put it to the witness that the 1st accused would testify that the deceased clapped her first after mistakenly concluding that the 1st accused had split his beer. The witness said that since he was busy on the disco, he could have missed the incident. As regards the state of sobriety of the 1st accused, the witness said that the 1st accused was not very drunk. The witness said that he could not deny the 1st accused's assertion that the deceased assaulted her outside the cocktail bar on the stomach. The witness said that he remained inside the bar and only went outside later after noticing the bar emptying of patrons.

Under cross examination by the 1st accused's counsel the witness said that the deceased was his nephew being his sister's son. He denied that the relationship between the two made him to falsely implicate the 1st accused. The witness said that the deceased was employed at Zimbiru Cocktail Bar as a guard. The witness agreed that the deceased could not stand toe to toe with the deceased in a fight because the deceased was much bigger than the 1st accused. The witness could not deny that the deceased provoked the situation. In fact his response was "I did not see who provoked who. I only went out and found the deceased being stabbed."

Under cross examination by counsel for the 2nd accused the witness said that the deceased was roughly of the same height with the 2nd accused although the latter was bigger in stature. The witness insisted that the 2nd accused held the deceased by one hand whilst another accomplice held the other hand. He testified that it was at the stage that the deceased was being held by the 2nd accused and the accomplice that he saw the deceased cut or stab the deceased on his hand.

On clarifications sought by the court, the witness said that he first saw the 1st and 2nd accused persons at around 9:00pm inside the cocktail. The 1st accused was in the company of the deceased and another person identified as Lameck, said to be a friend of the deceased. The three were standing and drinking beer. The initial altercation took place in the bar around 10.00pm and it was at that time that the witness saw the 2nd accused in the bar and later outside the bar.

The court noted that although the witness was related to the deceased, he did not colour his evidence to falsely implicate the accused persons. He did not exaggerate his evidence. He

conceded for example that he could not say that the deceased was not the aggressor or the one who torched the altercation through slapping the 1st accused. He said that he could not deny that the deceased kicked the 1st accused in the stomach outside the bar. Overallly the witness impressed the court as being honest in his testimony and testified to those matters which he personally witnesses whilst conceding on those matters which he did not personally witness even where his concessions supported or corroborated the defence version of events. The court accepted the witness testimony as reliable.

The 2nd State witness Calisto Matora is employed as a security guard at the Council Bar which is within the scene of the stabbing of the deceased. He knew both accused persons for a long time. He grew up in the same neighbourhood with the 1st accused person and knew the 2nd accused person as Madyira. He knew both accused persons to frequently patronize the cocktail bar drinking beer as revellers. He testified that on the night in question he was seated outside the cocktail bar. He saw the 2nd accused and one Enock holding the deceased by his hands, following which he saw the 1st accused stabbing the deceased on his hand twice. The 2nd accused and Enock held the deceased's arms stretching them out. He heard the 1st accused call out to the 2nd accused and Enock to hold the deceased's hands because the deceased was a "mhonya" (an adulterated Shona reference used to describe a strong person or bouncer- the word bouncer again being adulterated in slang to refer to a strong heavily built person yet in standard English, a bouncer is simply a security or doorman employed to police people and maintain order usually at public gatherings, bars, concerts etc).

The witness testified that he was some 6-7metres away from the affray. He heard the 2nd accused to call out to the 1st accused to come and inflict revenge upon the deceased whilst holding the deceased. There was electric lighting outside. He saw the 1st accused breaking an empty beer bottle and holding it by its neck. The 1st accused broke the bottle just in front of the witness. The witness said that the 1st accused bent over and hit the beer bottle on the ground to break it whilst clasping it by its neck. The deceased was coming from the toilets outside heading back to the cocktail bar. He saw the accused person and Enock come out of the bar together. The 2nd accused is the one who first held the deceased followed by Enock and the 1st accused immediately stabbed the deceased. The witness saw the deceased falling down some 5 metres away from the point where he had been stabbed. He said that the first witness intervened in the skirmish to restrain the accused persons. The witness heard the last witness shouting that they were injuring his colleague.

Under cross examination by accused 1's counsel the witness stuck to his story. He said that he did not intervene in the altercation because he was a small person and that it was not his duty in any event to stop the commotion. Asked as to what exactly he heard being said, he said that he heard the 2nd accused to say "come here friend. We got hold of your person. Come and stab him." He said that upon being stabbed the deceased cried out "maiwe, I have been stabbed."

Under cross-examination by counsel for 2nd accused the witness maintained his story as already alluded to. He added that there were between 10 – 20 people outside the cocktail bar at the time that the deceased was stabbed although he was the one nearest to the persons involved in the altercation.

The court was impressed by the witness' testimony. He is indeed a small man in stature. He was the kind of person who will stand aloof and not want to involve himself in occurrences which do not concern him. He was an innocent bystander whose interest was to watch the action as it unfolded. The witness did not strike the court as one who exaggerated or embellished his evidence. He stood well to cross examination, never changing his story. The court accepted his evidence as reliable.

The 3rd witness was Munyaradzi Mhike, a police officer and attending detail. He received a report of the stabbing of the deceased whilst on duty at the local police post. He proceeded to the scene of the skirmishes and interviewed the witness called Matova as to what had happened. On indications of the said witness, he collected pieces of the broken beer bottle and the neck piece which the 1st accused had used to stab the deceased. He got to the scene with his team around 1.00 am. After collecting the exhibits he proceeded to Makumbe Hospital where the deceased had been ferried to arriving there around 1.30 am. He learnt that the deceased had passed on. He observed two stab wounds on the left elbow of the accused's hand. He identified the broken bottle fragments and they were produced as exhibit 2.

Nothing eventful came out of the cross examination of the witness. The cross examination by both accused's counsel was very brief and not surprisingly so because there was nothing contentious arising from the witness testimony. The witness however denied that the 1st accused attended at the police station nor filed an assault report. The report he attended to was made by persons who were ferrying the deceased to hospital in a car and they passed through the police station.

The 4th state witness was Cornelius Tana, the investigating officer. His evidence was of no great moment. What may be significant is his testimony that the 1st accused person

surrendered herself to the police whilst the 2nd accused was arrested at his home around 4.00 pm in the early hours of 1 February 2016 and Enock around 10.00 am the same morning. Enock absconded bail whilst the 1st and 2nd accused have always abided their bail conditions.

The 1st accused's counsel did not cross examine this witness whilst counsel for the 2nd accused fielded questions on where the fragments of the broken bottle were found. The cross examination was of no assistance to the issues for determination more particularly in that the identification of the 1st accused as the person who stabbed the deceased was not in issue nor the fact of her having used a broken piece of beer bottle after the 1st accused broke it.

As regards the demeanour of the police witnesses and the acceptance of their evidence, the court had no reservations with the evidence of these witnesses. Their evidence related to the investigations carried out and was not conducive to assisting the court determine issues arising for determination. The nature of the witness evidence is an example of an instance where counsel, should have considered utilizing the provisions of s 314 of the Criminal Procedure & Evidence Act [*Chapter 7:07*] and discussed adducing it by way of admissions. As an aside, counsels are encouraged to keep in mind the existence and use of s 314. It is an important provision in the law of evidence and procedure. Admissions should be discussed by counsel prior to trial and where facts relevant to the trial are not in contention, counsel should prepare a list of admissions to save court time being unnecessarily wasted on matters which are common cause. Section 314 as aforesaid ensures that trials are not unnecessarily prolonged and justice delayed. A word of caution though is that the use of s 314 can only be fully utilised where there has been thorough preparation by both the state and defence counsels. Thorough preparation ensures that the state and defence cases are properly interrogated by counsel and issues ventilated. Admissions will be easy to discuss and make where there has been adequate and thorough preparation.

The last state witness was Precious Marichombo the bar lady on duty on the night of the incident. She knew both accused persons as frequent patrons at her work place. She had known the 1st accused for about 5 years and the 2nd accused for about a year. She saw both accused around 9.00 pm drinking beer by the counter. They were in company of the deceased. Enock whom the police advised escaped bail was also in the bar but was not part of the group comprising the deceased, and 1st and 2nd accused. The 1st accused and the deceased were nearest to each other bought a beer and went outside. The next things that the witness saw was the 1st accused pouring beer on the deceased. The 1st accused followed this up by holding the deceased by the collar of his shirt. The witness did not know the cause of the altercation. She

alerted Tapiwa Gareta to the commotion and ordered him to reduce the volume of the disco. Tapiwa reduced the volume and proceeded to where the 1st accused and the deceased were. He restrained them and everything appeared to be back to normal. The witness saw the deceased go outside the bar .. She next saw the 1st accused also go outside the bar holding an empty beer bottle. She did not see where the 1st accused took the bottle from.

The witness next saw patrons vacating the cock tail bar in large numbers going outside. People started shouting that Allan (deceased) had been stabbed. She went outside to see what was taking place. She saw the deceased lying on the floor on the verandah. The deceased was saying that he had been injured. The witness started to cry out of fear on seeing the deceased lying injured. People were gathered outside. The witness did not witness the skirmish outside the bar.

The cross examination of the witness by both accused's counsel was short. 1st accused's counsel suggested that the person who poured beer on the deceased was Lameck to which the witness responded that the person she saw pouring beer on the deceased was the 1st accused. Questioned by counsel for 2nd accused, the witness said that she saw the 2nd accused person go out of bar after buying his beer before the quarrel between the 1st accused and the deceased. The witness said that she did not see the 2nd accused for the rest of that evening.

The court put questions to the witnesses to clarify the witness evidence. She said that a period of some 30 minutes elapsed from the time that the deceased went out of the bar after the scuffle with the 1st accused and the 1st accused following in turn. She said that inside the cock tail the 1st accused and the deceased sat side by side on chairs against the bar counter. The two sat together drinking their beer for about 30 minutes before the 1st accused poured beer on the deceased. Prior to that the two were conversing and it surprised the witness as to what had gone amiss when she witnessed the 1st accused pouring beer on the deceased. Asked to clarify what she meant by "pouring beer", the witness said that on what the 1st accused raised her beer bottle and splashed the deceased with beer on his face and front upper part of his body. She said that after the intervention of Tapiwa Gareta peace prevailed once more and normalcy returned. The evidence of this witness was straight forward and given confidently. The court accepted it.

Before closing the state case, the prosecutor produced the 1st accused's purportedly confirmed warned and cautioned statement by consent. The court accepted the statement as exhibit 3. In response to the allegations of murder, the 1st accused responded as follows:

"I admit to the allegations of murdering/killing the complainant. I cut him with a broken beer bottle twice on his hand because he was assaulting me. The complainant was assaulting me he was alleging that I had spilt his beer whereas it was Lameck and not me."

It should be pointed out that the court queried why the statement was not endorsed on its face with the words “confirmed” as provided for in s 113 (3). Counsels for the state and 1st accused agreed to have the statement produced on the basis that the 1st accused was agreeing that she was the one who had made the statement freely and voluntarily without any undue influence being brought to bear upon her. In passing, magistrates should be reminded to strictly adhere to the provisions of s 113 of the Criminal Procedure & Evidence Act. The provisions are couched in peremptory terms. A failure to strictly follow them renders the confirmation proceedings void. The consequences of a failure to strictly adhere to the provisions of the said section inevitably results in the magistrate having to appear in court to testify on what such magistrate did in purportedly confirming the statement. Unfortunately, such a course leads to the questioning of the magistrate’s abilities and knowledge of the law. Where the magistrate has complied with the provisions of the law, such magistrate will confidently give evidence if called to testify on questioned confirmation proceedings and avoids being made a fool in the witness box.

Exhibit 4 was the 2nd accused’s warned and cautioned statement, also produced by consent. The statement was properly endorsed confirmed by the same magistrate who omitted to do so in the statement by the 1st accused. The 2nd accused’s response reads as follows:

“I deny the charge of murdering the complainant. On the day in question I was partaking beer with a friend when Allan started assaulting Shelter Jachoka. I stood up and restrained the now deceased by standing in between him and Shelter Sachoka to stop the attack. After the beer drink I went home. By the time I left for home, the now deceased and Shelter Sachoka were no longer in the bar.”

The state closed its case and both accused persons elected to testify on oath.

The 1st accused (accused) testified that she stayed in Zimbiru Village, Chief Chinamora and was aged 22 years old. She was asked by her counsel as to what she did for a living and she responded that she was “a sex worker.” The term sex worker is the accused’s case is just a synonym or euphemism for prostitute. Whilst the term can have broad meanings like describing a person engaged to perform sexually explicit conduct e.g. pornography whilst being filmed, the accused was or is in the habit of offering direct sexual services for money. The deceased and the accused knew each other well as they grew up in the same neighborhood and there was no bad blood between them.

On the fateful night she went to Zimbiru cocktail bar for a beer drink. She arrived around 8.00 pm. She was called to where one Lameck and the deceased were seated drinking

their beer. Lameck is the one who called her to where the deceased and Lameck sat. When she got to where the two were, Lameck's girlfriend from the local hotel pitched up into bar. Lameck perhaps not wanting to raise his girlfriend's suspicion that there could be something going on between him and the accused person ignored the accused and did not talk to her. He instead rose from where he was seated and in the process spilt beer on the deceased without realizing it. The deceased did not notice that it was Lameck who had spilled the beer. He confronted the accused person and accused her of spilling beer on his trousers. When the accused person denied the accusation and told the deceased that she was not the culprit but Lameck, the deceased did not accept the accused's explanation. He said that he was unhappy that his trousers now smelt of beer and yet the accused person was denying responsibility.

The accused testified that the deceased then slapped her and she staggered towards the wall. The deceased continued to assault her until he was restrained by Tapiwa Gareta, the 2nd accused and other persons whom she did not identify. The accused then went outside the cocktail bar. Outside the bar, the deceased remonstrated with her and dared her shouting how given her age and size, she had the guts to pour beer on him. She said that the deceased then kicked her on the stomach and she fell to the ground. The deceased was being restrained by other persons as he continued to assault her. In the process of her being assaulted, the accused said that a friend of hers came to the scene holding in beer bottle. The accused grabbed the beer bottle from her friend to arm herself. The deceased on seeing the accused holding the beer bottle dared the accused asking her by what audacity she thought she could use a beer bottle on the deceased. The deceased said that he would assault the accused inspite of her being armed with the beer bottle. He then made for the accused in order to assault her. As the deceased person approached her, she broke the bottle and cut him on his hand with the bottle. She testified that the deceased continued to assault her. At that time Tapiwa Gareta arrived at the scene and accused, the accused person of having stabbed his friend. Tapiwa slapped the accused.

The accused testified that Enock, the accused person at large arrived at the scene and offered to accompany the accused person to the police station. Enock was someone who would occasionally be her client for sex if he booked her. The accused said that she reported an assault case against her by the deceased. However, the police asked her to return in the morning and exclaimed that there were too many reports of the deceased assaulting people being received but that the complainants would withdraw their complaints. The police said that they hoped that she would agree to go to court and not also withdraw her complaint. She testified that she

proceeded to her home. She was however awakened by police who told her that she was now the accused because the deceased whom she had cut on the hand had passed on. She said that she only stabbed the deceased in an endeavor to stop him from assaulting her without intending to kill him nor foreseeing that the deceased might die. As regards the involvement of 2nd accused, she testified under cross-examination by counsel for the second accused that she last saw him inside the cocktail bar when he restrained the deceased from assaulting her. She denied that the second accused held the deceased nor did she see him at the time that she stabbed the deceased.

Under cross examination by state counsel, the accused maintained her version of events that she was the victim of an assault by the deceased both inside and outside the cocktail bar. She denied that the deceased was being held by his hands by Enock and 2nd accused when she stabbed the deceased. She denied that state witness Callisto Matova was at the scene and dismissed his testimony or version of what took place as being untrue. When it was put to her that Callisto had testified that she stabbed the deceased twice, the accused admitted that she did stab the deceased twice on the hand. She admitted that Tapiwa Gareta arrived at the stab scene but denied that he mollified the altercation. She said that he instead slapped her and that by the time he arrived at the stab scene, she had already stabbed the deceased.

She denied that Enock, the accused at large was her friend. She said that the same way that she related with the deceased was the same way that she related with Enock. She denied that she was called upon by Enock and second accused to come to where they held the deceased so that she would revenge.

In the court's assessment of the first accused as a witness, and her demeanour, the witness stood up well to cross examination and maintained her version of events. The fact that the 1st accused stuck to her story does not necessarily mean that her account of events is to be preferred. The court will consider her evidence together with all the evidence led and probabilities and determine as to where the truth lies.

The 2nd accused (accused) on his part testified that he lives on menial jobs and has three children. He was friends with the deceased whom he had known and played with for about 5 years. He had known the first accused whom he used to see at the shopping centre for 3 years prior to 31 January, 2016.

On the fateful night, the accused testified that he arrived in the cocktail bar from work just after 9.00pm and ordered a super (opaque) beer which he drank whilst seating next to a friend. Some 10 – 15 minutes later he saw the deceased assaulting the 1st accused some three

metres away from where he sat. He went to where the assault was taking place and got in between the first accused and the deceased. The deceased pushed him aside and did not want to be restrained. Lameck who had been with deceased shouted at the accused that should not intercede and “control things” and that if he wanted to control things he should do so at Mungate Village where he hailed or came from. The accused said that he then decided to keep out of the commotion and went back to his friend. They left the cocktail bar going to catch a commuter taxi to go home. When he left, the commotion inside the cocktail bar was still in progress and other persons whom he did not recognize were restraining the fighting between the first accused and the deceased. He went home and was arrested the following day around 5.00am on allegations of killing the deceased.

Under cross examination by counsel for first accused whether he knew why the deceased was assaulting the 1st accused, he said that he did not know.

Under cross examination by state counsel he agreed that people commonly referred to him as Madyira. He knew the witness Callisto Matova by sight and could not dispute that Matova knew him as Madyira. He denied ever holding the deceased’s hand nor being restrained by Tapiwa Gareta. He denied knowing Enock Mutikinya. He insisted that the deceased assaulted the 1st accused with open hands and that he stood in between them to restrain the deceased. He denied being at the scene when the deceased was stabbed nor assisting the 1st accused to assault the deceased. He said that contrary to the evidence of Tapiwa Gareta that he was very drunk, he was in fact moderately drunk. He said that his friend in whose company he was is called Moses Mfena. He however, did not call him to testify. Questioned by the court, he said that he did not know Lameck prior to the night of the altercation. He knew the name through hearing people shouting saying “Lameck restrain your friend from assaulting the 1st accused. Lameck in turn responded saying that the deceased and the 1st accused should be left alone to “finish with each other.”

Again as with the 1st accused, the 2nd accused stood by his version of events including under cross-examination. As already indicated, the fact that a witness sticks to his story does not make the version the truth. In assessing whether or not the version is true and correct, the court assesses the evidence as a whole and factors in the probabilities.

The evidence led from both the state witnesses and the 1st accused is that the deceased was stabbed by the 1st accused. This much is common cause as much as the fact that the deceased died of the stab wounds inflicted by the 1st accused using a broken bottle. Did the 1st accused intend to kill the deceased? The answer is evidently a no. The enquiry becomes

whether the 1st accused foresaw the risk or possibility that her conduct might result in the death of the deceased and nonetheless continued to engage in that conduct despite the realization of such risk or possibility. The 1st accused evidently did not engage in conduct which was persisted in. She appears on the evidence to have spontaneously stabbed the deceased twice. The scene was not static both inside the cocktail bar and outside. The court was convinced on the evidence that there was a drunken brawl involving the 1st accused and the deceased. The nature and cause of the brawl are matters of no great moment. What is clear is that there was an occurrence which torched the brawl inside the bar. The state witnesses testified to seeing the 1st accused pouring or splashing beer on the deceased, yet the two had been seating together or next to each other imbibing their beer. It is not possible for the court to say that the deceased did not provoke the situation as testified to by the 1st accused and 2nd accused. Whatever happened between them degenerated into a confrontation both inside and outside the cocktail bar.

The 1st accused pleaded self defence she alleged that she was under attack by the deceased and decided to retaliate by stabbing the deceased. For self defence to succeed as a full defence to a charge of murder, the accused must satisfy the court on a balance of probabilities that he or she was cornered and could not have escaped from the situation other than through engaging in the conduct that he or she resorted to. Self defence is provided for as a defence to homicide in s 253 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. For the defence to succeed as a full defence, the evidence must establish that the attack on the accused was unlawful, had commenced or was imminent or reasonable grounds existed for the accused person to believe that the attack had commenced or was imminent. The conduct of the accused person must be necessary to avert the unlawful attack and there must be no other way to escape from the attack. The means used must not only be reasonable in the circumstances but must not be disproportionate to that liable to be caused by the unlawful attack.

In casu, the 1st accused testified that immediately before she stabbed the deceased, she was kicked in the stomach and fell down. She said that the deceased continued to assault her thereafter. The nature and extent of the continued assault was not disclosed to the court. The uncontroverted evidence adduced by both the State and the 1st accused was that the 1st accused was on her feet when she stabbed the deceased. The 1st accused said that the deceased was advancing towards her, assaulting her. However, the first accused had time to grab a beer bottle (on her evidence) from a friend. She broke it and had time to do so. A person who is cornered with no escape option would not be expected to get hold of a weapon and sharpen or prepare it

to ward off an attack. The 1st accused did not use the bottle just after grabbing it. She prepared it for use. The same reasoning would apply if the court was to prefer the state evidence that the 1st accused went outside the bar with a beer bottle. She had time to break it and use it. She stabbed the deceased on the hand twice. Significantly the 1st accused did not say that she tried to run away and seek refuge but was cornered. Clearly on her account the defence of her person as a full defence does not avail itself to her.

With respect to the 2nd accused, he pleaded an alibi in that he had already left the cocktail bar for home by the time that the stabbing took place. The details of his alibi were scanty and certainly not backed up by any evidence from either his friend whom he was in the company of nor anyone else who saw him leave the scene prior to the stabbing. Whilst there is no onus in law for an accused to prove his alibi, with the onus being on the state to disprove it, the accused should nonetheless allege sufficient facts to support his alibi which the state can then investigate and confirm. In the defence outline, the 2nd accused outlined that Moses Mbofana would verify the alibi. Moses did not testify.

In his warned and cautioned statement the 2nd accused averred that by the time he finished drinking his beer, the 1st accused and the deceased were no longer in the cocktail bar. This presupposes that the stabbing incident or commotion outside must have taken place whilst the 2nd accused had remained in the bar. This version contradicts his evidence that he left just after he had failed to restrain the 1st accused and the deceased from their brawl or fight. It is also improbable that the 2nd accused would suddenly have become a disinterested person in events which unfolded after he had according to him unsuccessfully tried to intervene.

In the view of the court, whether the deceased was being held by his hands by the 2nd accused or not at the time of the stabbing does not prove intention to kill or foreseeability of the risk of death. In fact the stab point is wholly inconsistent with an inference of actual intention and foreseeability of the risk of death occurring. The court was convinced on the probabilities that the 2nd accused made common purpose with the 1st accused and assisted her directly or indirectly to settle with the deceased. Further, in the conclusion of the court, the deceased was not an innocent victim in the whole drama. To hold that he was innocent would fly in the face of all reason and probability because it would mean that he was attacked both inside and outside the cocktail bar for no apparent reasons yet the deceased and the 1st accused, 2nd accused had been peacefully drinking their beer.

In the finding of the court, the 1st accused clearly overreacted and exceeded the bounds of self defence by attacking the deceased with the beer bottle which she first broke to ensure

that it would be effective in its use as a weapon. The second accused's alibi is not an alibi at all for want of detail and for being in conflict with his evidence in court and the state evidence. The 2nd accused regard being had to the provisions of s 196A of the Criminal Law Codification and Reform Act is liable to be convicted of the same offence as the 1st accused person as a co-perpetrator. He was present in the vicinity of the crime scene in circumstances which implicated him directly or indirectly in the unlawful conduct of the 1st accused.

The court having found that self defence as a full defence is not available to the 1st accused, finds that first accused used means which were not reasonable in the circumstances to avert an unlawful attack upon her whether the same be said to have been in progress, imminent or that she reasonably opined that she was about to be attacked. Having made the above finding, and consequent upon the provisions of s 254 of the Criminal Law Codification and Reform Act both accused are found guilty of culpable homicide.

Sentence

In assessing sentence, the court took into account the submissions made by the counsel for the accused persons and the state. In the case of the 1st accused, she is a female first offender with two young children aged 5 years and 3 years respectively. She is youthful as she is aged 22 years. She was remorseful for her misdeed and admitted causing the injuries which led to the death of the deceased although she pleaded self-defence. She had also taken alcohol but was no so drunk as not to know what she was doing.

The 2nd accused is a first offender, married with 3 children. His wife is not employed and he is the sole bread winner for his family. He also had taken alcohol.

State counsel submitted that although both accused were first offenders they committed a serious offence. He submitted that their degrees of negligence were high and thus their moral blameworthiness was high. He asked the court to pass a sentence which emphasised the sanctity of human life. He submitted that offences of this nature were on the increase.

There is no gainsaying that human life was needlessly lost in this case. The right to life of every person is a fundamental human as given in s 48 of the Constitution. This right cannot in terms of s 86 (3) of the Constitution be limited by any law except as provided in s 48 (2) which gives the legislature the right to pass a law permitting the imposition of a death sentence for the offence of murder where the murder is committed in aggravating circumstances and where the murder is committed by persons other than those excepted by s 48 92) (c) and (d).

In this case, the accused persons stand convicted of culpable homicide by negligently causing the death of the deceased. The offence and the penalty range are codified in s 49 of the

Criminal Law Codification Reform Act. The legislation provided for a sentence of imprisonment for life or any definite period of imprisonment, or a fine not exceeding level fourteen or both. The offence is therefore viewed as a serious one which it is.

A disturbing feature of this case which called for the court's comments was the bold assertion by the 1st accused that she was a sex worker who at 22 years old already has a 5 year and 3 year family sired by different men. It means that she had the first child at 17 years old. Her being a self-confessed prostitute is an indictment on society. Section 20 of the Constitution impose a duty on the state and all agencies of government at every level to take reasonable measures including taking affirmative action programs to look after the youth. The youth are supposed to be integrated into society as useful and productive members. Youths should inter-alia be afforded employment opportunities and other avenues for economic empowerment? The 1st accused is an example of the failure of responsible institutions to protect and safeguard the well-being of the youth. It is hoped that the state will progressively take measures to ensure the non-exploitation of youth such as 1st accused and to assist them to live a fruitful and productive life.

The prosecutor submitted that offences of the nature as in this case are on the increase. This is correct. There is increased abuse of alcohol and drugs and those involved end up turning violent on each other. The 1st accused from the accepted evidence used a dangerous weapon which she prepared for use. She took hold of an empty beer bottle and broke it in order that it would inflict injury. She did not behave like a person intent on defending oneself or seeking to remove from the affray. She decided to arm herself and stand her ground encouraged by her accomplices who included the 2nd accused and the other accused person at large. It is because of the 1st accused's boldness and aggressive reaction that it was considered that she did not deserve a sentence different from the 2nd accused albeit the 2nd accused being male.

Whenever life is lost through negligence in circumstances which could have been avoided and in situations which are an everyday occurrence, depending on the degree of negligence shown by the accused which largely guide the court in making a determination on the level of moral blameworthiness of the accused, sentences which sufficiently deter the like-minded persons whilst punishing and further deterring the offender are called for.

Society must learn that by allowing and licensing liquor outlets the state intends that the places be used to provide recreation and entertainment for revellers. The outlets should never be used as places for violence. In the case of the 2nd accused, he was said to have been very drunk if not a nuisance. Alcohol must be taken in moderation. Unfortunately, the liquid is

being abused. The deceased himself must have been somewhat drunk because even though the evidence led was conflicting as to his state of intoxication, the court found that he must shoulder some blame for the altercation because of the probabilities which point out to his having said or done something to provoke the 1st accused who reacted according to the evidence of the bar lady, by pouring or splashing beer on the deceased yet the two had been sitting next to each other partaking their beer and amicably conversing. The court without condoning disorderly behavior in a licensed premise nonetheless considered in assessing sentence that the minds and actions of all the actors, deceased included, must have been affected by the beer which they were imbibing.

The court considered whether there was justification for differentiating the sentences of the accused person bearing in mind that the 1st accused was a female first offender and single mother at that time. The conduct of the 1st accused however was violent and vengeful.

She did not conduct herself as one would have expected of a lady. She was not cornered and acted out of a brazen resolve to get even with the deceased in circumstances where she ganged up with the 2nd accused and the accomplice at large. A gang attack finds little sympathy with the court.

In all the circumstances of the case therefore and in the exercise of its discretion after having taken into account all the circumstances surrounding the commission of the offence and balanced them with those pertaining to the accused persons, they are similarly sentenced as follows with the greater part of the sentence being suspended to allow them a chance to quickly reintegrate into society and lead exemplary lives.

Each accused: 7 years imprisonment of which 4 years imprisonment is suspended for 5 years on condition that during that period they are not convicted of any offence of which violence is an element for which upon conviction they are sentenced to serve an effective term of imprisonment without the option of a fine.

*The Prosecutor General, State's legal practitioners
Chirimuuta & Associates, 2nd accused's legal practitioners (pro-deo)*