

THE STATE
versus
SHELTON KAVHAYI

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 10, 11, 12 & 20 October 2016 & 26 July 2017

Assessors: 1. Mr Gweme
 2. Mr Barwa

Criminal Trial

H. Muringani for the State
B. Marowa for the accused

ZHOU J: The accused is facing a charge of murder as defined in s 47 of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. It is being alleged that on 6 January 2013 at Magunje Growth Point, Magunje, the accused unlawfully and with intent to kill or realizing that there was a real risk or possibility that his conduct might cause death, stabbed the now deceased Wellington Nzombe once on the neck with a broken bottle thereby causing injuries from which the deceased died. The accused pleaded not guilty to the charge, and tendered a defence outline which was produced in this court.

The state, in seeking to prove its case, relied on the evidence of six witnesses. The evidence of two witnesses, namely, Andrew Choruma and Admire Chikutiro was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The other four witnesses gave *viva voce* evidence. These are Dudzai Gara, Admire Muroiwa, Phillip Tawanda Nyamayaro and Nobert Mangwiwo.

Dudzai Gara knows the accused as he used to sell shoes in the Magunje area. She did not know the deceased prior to his death. She was employed at Mukanya Night Club as a cashier. Her evidence was as follows. On 6 January 2013 the deceased came into the night club for a

beer drink with his colleague, Albert Matara. In the evening around 2000 hours the deceased and his colleague left to go to another bar. Around that time the witness decided to go and buy some *sadza* at a nearby guest house. As she was proceeding to the guest house she heard commotion as people were shouting, "Get hold of him! Get hold of him!" At that time she noticed the deceased person moving in her direction. He was staggering. The deceased was about 4 metres from her when the accused person came pursuing him, got hold of him and turned him towards the eastern direction. She then noticed that the accused had stabbed the deceased when she saw blood oozing out. She did not see the instrument used by the accused to stab the deceased. The deceased held the witness by her shoulders in order to seek assistance. He was having convulsions. As the deceased held her a stone was thrown towards her but she was missed by it. She immediately left the deceased person and ran back to her workplace. The accused was wearing a white shirt. She was able to identify him because the place was illuminated by lights from a nearby shop. She had seen him earlier on that day. When she went back to Mukanya Night Club the deceased followed. Her employer went to make a report to the police. She removed the deceased's shoes. When she removed the deceased's shirt he opened his eyes which made her conclude that he had passed on. She left the night club while crying. She intended to go to the police but met her employer who was coming to the night club in the company of a police officer. She told the police the name of the accused as she knew him by name. She described the accused's physical appearance as tall and slim. The description accurately reflects the physical built of the accused. She did not see other persons nearby when the accused stabbed the deceased. The witness went with the police to the accused's residence where the accused was arrested.

The second witness, Admire Muroiwa, was employed by the Zimbabwe National Army as a soldier. He knew the deceased as they worked together. He also knew the accused as a person who used to sell shoes at Magunje. The witness was the proprietor of Mukanya Night Club. His evidence was that on 6 January 2013 he was playing a game of snooker in the Night Club when Dudzai Gara who had left to go and buy some food came running to tell him that his colleague was being assaulted. He and the other persons who were in the night club went out of the club. When they got to a small gate at the premises they met the deceased. When the witness asked the deceased what the problem was the deceased asked to be left alone. He

proceeded to the toilet at the night club before he returned into the night club where he then collapsed. The witness touched the deceased's chest. He noticed that it was wet. With the assistance of the other persons in the night club, they moved the deceased to a place where there was some light. That was when the witness felt by his hand that the deceased had a wound, and also saw that he was bleeding. He went to the police to make a report. He sent another person to notify his superiors who were in another bar that the deceased had been injured. Transport arrangements were made and the deceased was ferried to a clinic at the Zimbabwe National Army camp in that area. Dudzai then told her that the person who had pursued the deceased was the one who used to sell shoes. When the police came he went with them to the place where the deceased had been stabbed which he said was about 60 – 80 metres from Mukanya Night Club. He stated that he observed blood at the place where the deceased had been stabbed. The place was illuminated by light from a Power Sales shop which was less than six metres away. There was also a Net-One container nearby.

Phillip Tawanda Nyamayaro, a Detective Assistant Inspector in the Zimbabwe Republic Police, was based at Criminal Investigations Department in Karoi in January 2013. After a report of a murder was received from Magunje Police station he left for Magunje in the company of Detective Assistant Inspector Guri and Assistant Inspector Mupukutwa. After being briefed by the officer-in-charge of Magunje Police Station he and the other detectives interviewed Dudzai Gara who informed them that he had seen the accused when he stabbed the deceased. Dudzai Gara also gave the witness the name of the accused. In the company of the other officers and Dudzai Gara, the witness went to the place where the deceased had been stabbed. He observed blood on the ground. They marked the scene. They then proceeded to the accused's residence and found him sleeping. They arrested him. At the time of the arrest the accused was wearing a white t-shirt and a blue pair of jeans which had blood stains. The accused stated that he had had a fight with the deceased. The accused led the witness to the residence of his brother, Respect Kavhayi, whom he said had given him the knife which he had used to stab the deceased. They also arrested Respect Kavhayi. The accused told the witness and the other officers that the deceased had bitten him on his right hand using his teeth. The accused and his brother were taken to Magunje Police Station where they were detained.

Nobert Mangwiro, the investigating officer, is based at the Zimbabwe Republic Police Criminal Investigations Department at Karoi. Upon being assigned to investigate the case he went to Magunje Police Station where the accused was detained. He was accompanied by Detective Sergeant Humbai and Assistant Inspector Mupukuta who was driving the motor vehicle in which they travelled. He located the witness Dudzai Gara who narrated how she had seen the accused pursuing the deceased and stabbing him. He interviewed the accused separately. The accused admitted to having had a misunderstanding with the deceased inside Kasemamuriwo Bottle Store and to a fight outside the bottle store, but denied knowledge of how the deceased had met his death. He also interviewed the accused's brother who completely denied knowledge, but stated that the accused person and the deceased had indeed had a misunderstanding following which they had gone outside the bottle store. He took Dudzai Gara for indications. Dudzai Gara indicated to him where she was standing when she saw the deceased being pursued by the accused, as well as where she was when the accused stabbed the deceased. At the scene the witness observed blood in the soil. He observed that the distance between the point where Dudzai Gara was when the deceased was stabbed and where there was blood was about five (5) metres. Dudzai Gara told the witness that she positively identified the accused as the person who had stabbed the deceased and described that he was wearing a white t-shirt. She told him that the accused ran in the direction of Magunje Inn after stabbing the deceased. Dudzai Gara also indicated the place in the bottle store where the deceased had collapsed. After that the witness took the accused person for indications. He indicated where the misunderstanding had started in Kasemamuriwo Bottle store, and the place outside the bottle store where he said he had engaged in a fist fight with the deceased. The accused completely denied knowledge of how the deceased was injured or how he met his death. At the scene the witness observed pieces of broken glass, including the bottom part of a bottle. The witness took the accused back to the police station. He then took the accused's brother for indications. The brother pointed out where he was seated in the bottle store when the deceased and accused went out. The witness noted that from that position the brother of the accused could not have seen where the fighting was taking place. He then visited the mortuary where he observed a wound on the neck of the deceased as well as dry blood which suggested that there could be a blade. He

then took the body of the deceased to Karoi Hospital for a postmortem examination by Dr Chikutiro.

On the same day, 8 January 2013, he interviewed the accused again but he continued to deny involvement in the death of the deceased. He left the accused with his brother at the reception at the Karoi CID offices. Thirty minutes later the accused's brother called the witness to the reception area and told him that the accused now wanted to tell the truth regarding the matter. The accused narrated to the witness that during the fight the deceased had beaten him on the forefinger before running across the nearby road. The accused stated that because of the pain on the forefinger he had picked a broken empty bottle and pursued the deceased before he held him from behind and stabbed him on the neck. He left the deceased bleeding profusely and ran towards Magunje Inn where he dropped the broken bottle by the roadside. Based on this new information, the witness took the accused person to the scene for fresh indications the following morning. The accused took the witness to the place outside Kasemamuriwo Bottle Store near the verandah where he stated that he had picked the broken bottle. The witness observed pieces of broken bottles at that place which he took. The accused then took the witness to the place where there was blood in the soil and explained that during the fight there a workmate of the deceased, Albert Matara, joined in which made the accused use the broken bottle to stab the deceased in the neck. He said that after stabbing the deceased he ran towards Magunje Inn. Accused took the witness to the place where he said he had dropped the broken bottle. After a search a broken neck of a castle larger bottle was found. The witness identified the broken bottle but stated that it had a longer blade when he picked it. He noticed in court that the portion of the bottle had been broken. The piece had sharp edges. He explained that he had seen the broken bottle when the trial commenced and it was in the condition that it was when he recovered it. He explained that it must have been broken by the stone which it was kept together with which was also an exhibit. At the place where the broken bottle was recovered there were no other pieces besides that one indicated by the accused. Back at the place where broken bottle pieces had been recovered the witness recovered a stone which Dudzai had said had been thrown from the direction where the accused and deceased had come. Following the indications the witness prepared a sketch plan which was produced in evidence as exh 4. Back at the CID offices the witness interviewed the accused's brother about the issue of the knife which had earlier on been

mentioned by the accused as having been used to stab the deceased. The accused's brother denied any knowledge of the knife and stated that he had never been involved in the dispute. The accused also exonerated his brother. The witness accepted from the statements that the accused's brother was not involved in the matter. After explaining the content and nature of the charge in accordance with the law, he recorded a warned and cautioned statement from the accused during the presence of Detective Sergeant Hambai. The accused signed the statement. The witness explained to the accused that he could be taken for treatment of his forefinger but the accused refused to go to hospital. The witness stated that he had collected the clothes which the accused was wearing on the day in question which had been recovered by the attending details with the intention to take them to South Africa together with the deceased's clothes for the blood samples to be examined. He had been informed that the blood samples taken from the accused and the deceased's body had been taken to South Africa for examination but the results were not yet available at the time of the commencement of the trial.

The witness stated that from his interviews with the persons who were present Albert Matara was not involved at all in the misunderstanding and fight between the deceased and the accused.

Andrew Choruma is a registered General Nurse employed by the Zimbabwe National Army as an Assistant Regimental Medical Officer stationed at 23 Combat Camp, Magunje. He knew the deceased as a fellow soldier stationed at the same camp. On 6 January 2013 at about 2050 hours he received the deceased as a patient. He observed the following on the body of the deceased: that the deceased had a deep stab wound on the neck; that he was no longer breathing; that he had no pulse; that his blood pressure was not available; that his eye pupils were not responding to light; and that he was cold. He therefore referred the deceased's body to Karoi District Hospital for a doctor to examine and certify if the deceased was dead.

Admire Chikutiro is a duly qualified Medical Practitioner employed as a Government Medical Officer at Karoi District Hospital. On 7 January 2013 he received and certified dead the body of the deceased Wellington Nzombe. He conducted a postmortem examination of the body. During the examination he observed that the deceased had a stab wound on the neck in the region of the Cricoid Cartilage. He concluded that the cause of death was severe haemorrhage

secondary to stab wound. He prepared a postmortem report which was produced before this court as exh 1, in which he recorded his observations and conclusion.

The accused gave evidence. He was the only witness for the defence. He adopted his defence outline to be part of his evidence. His oral testimony was as follows. On 6 January 2013 he and his brother went to Magunje Growth Point. At the growth point they proceeded to Kusemamuriwo bottle store where they bought opaque beer sold in a container commonly known as “scud”. They shared the one beer. They bought a second beer which they also consumed. During that time, which was around 1900 hours, the deceased and his colleague whom he later knew to be Matare arrived at the bottle store. He greeted them. They reacted by asking whether he knew them and why he was greeting them. Matare grabbed him by his belt and alleged that the accused was the police officer who had previously arrested a colleague of the deceased and Matare who had been imprisoned. The accused also held him by the other side. The two were holding bottles of beer. Four of the deceased’s workmates and superiors were in the bottle store. These were Major Chagonda, Marufu, Bhekete and Chimanga. One of the superiors inquired as to why the deceased and his colleague were having an altercation with a member of the public, to which Matare said the accused was the police officer who had caused their colleague to be sent to jail. They pushed the accused out of the bottle store. Outside the bottle store the deceased started to assault the accused using a bottle. The bottle fell on the veranda and broke into pieces, leaving behind the upper part of it. The deceased’s colleague picked up the piece from the broken bottle. A fight ensued during which the accused was bitten on the shoulder by the deceased. When he tried to push the deceased away from him the deceased bit him on the left thumb. Matare had picked the broken bottle intending to strike the accused. He missed him. He sought to strike the accused for the second time but missed his intended target and, in the process, stabbed the now deceased because the accused was using the deceased as his shield. About five other persons whom the accused thought to be workmates of the deceased joined in the fight demanding that he be caught. He ran away. As he ran away Matare threw the bottle at him and hit his jean trousers before the broken bottle fell on the grass. He ran towards Magunje Hotel. He said that when he signed the sketch plan he was not given the opportunity to read it but was only told to sign it. His evidence was that on the night in question he was wearing a white and purple jersey. He stated that the blood on his shirt and

trousers was not of the deceased but his from the injuries which had been inflicted upon him when he was bitten by the deceased.

During his evidence in-chief the accused was asked to explain his statement to the police which he made on 8 January 2013. His evidence was that he was coerced into making the statement after being threatened with truncheons by more than twenty police officers who tied his hands and covered them with a cloth. He admitted to having stabbed the deceased during the fight because of fear of the threatened assault. When he went for the confirmation of his warned and cautioned statement he had been threatened into sticking to what was already in his statement otherwise he would have to go back for further investigations. Although the court room was cleared and only his relatives remained in court the accused person did not challenge the warned and cautioned statement.

The accused stated that the broken bottle which was used to stab the deceased was bigger than the one which was produced in court. On being asked how he knew about that his response was that he knew that fact because the bottle had been thrown at him after the deceased had been stabbed. He stated that the bottle which was produced in court was the only one which was found at the place that it was Nobert Mangwiro insisted that that was the bottle which accused had used to stab the deceased.

From the evidence led the following facts are common cause. The deceased was at Magunje Growth Point on 6 January 2013. The accused was also at the growth point. In the evening of that day an altercation ensued between the deceased and the accused when they were inside a Night Club. The altercation degenerated into a fight when they went outside the night club. The deceased was stabbed in the neck. He died as a result severe haemorrhage caused by the stab wound.

The first issue for determination is of the identity of the person who stabbed the deceased in the neck, thereby causing his death. Dudzai Gara's evidence was that she saw the accused person when he was pursuing the deceased person, and when he got hold of the deceased and turned him before blood started to come out of his neck. That version must be assessed in the light of the accused's denial that he was not at the scene where the deceased was seen to have been stabbed by Dudzai. The court must be satisfied that beyond reasonable doubt the person who was seen pursuing, holding and stabbing the deceased was indeed the accused. Whenever

the identification of an accused person is contested the court is enjoined to approach the evidence of the identifying witness with caution in order to be satisfied that the observation of the witness was reliable. In the case of *S v Mthetwa* 1972 (3) SA 767(A) at 768A-C, HOLMES JA outlines the principles relevant to the testing of the reliability of the witness's observation in the following terms:

“Because of the fallibility of human observation, the evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various facts such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait, and dress; the result of the identification parades, if any, and of course, the evidence by or on behalf of the accused. This list is not exhaustive. These factors, or such of them as are applicable in any particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.”

The principles set out above have been endorsed by our courts and consistently applied in this jurisdiction, see *S v Dhliwayo & Anor* 1985 (2) ZLR 101(S) at 107A-D; *S v Ndhlovu & Ors* 1985 (2) ZLR 261(S) at 263G-264E; *S v Mutandi* 1996 (1) ZLR 367(H) at 370E-371F; *S v Gomera* 2002 (1) ZLR 591(H) at 594A-E; *S v Marera & Ors* HH 518-16 at p. 7; *S v Chivengwa* HH1-17 at p. 14. As illustrated by the judgments cited above, the court's sensitivity to the need for caution must be reflected not just by an acknowledgment of the need for such caution but by demonstrated engagement with the totality of the evidence placed before the court.

Dudzai Gara's evidence remained consistent. She did not seek to exaggerate it. She stated that she did not see the actual act of stabbing or the instrument used. There was no suggestion as to why she would deliberately implicate the accused person. She came to the conclusion that the accused was the one who stabbed the deceased because she not just knew him from about 2008 but had seen him for some time during that day. Accused was known at and around Magunje Growth Point as he used to sell shoes. She also saw the clothes which the accused was wearing, especially the white shirt. She was able to accurately describe the accused's body built in court. There was light from a nearby Power Sales shop which enabled her to observe the events as they occurred. Further, she was just about five metres from where the accused and the deceased were when the deceased was stabbed. The investigating officer

was able to measure the distance from where Dudzai Gara stated that she was standing to where the deceased was stabbed. The point where the deceased was when he was stabbed is marked “E” on the sketch plan, exh 4. Point “G” is the point where Dudzai Gara was standing when she was held by the deceased after he had been stabbed. “G” is just close to “C”, which is the point where Dudzai Gara stopped and observed the deceased being chased by the accused. Point “F” of exh 4 was the place where the investigating officer observed blood, and was the point to which the deceased staggered after being stabbed before he sought assistance by holding onto Dudzai Gara. She gave a detailed account of the condition of the accused when he held her shoulders. She stated that he was convulsive. When she extricated herself from his grip her own clothes were drenched in blood. All that evidence was not challenged. There was no suggestion that there was no blood at the point “F” as observed by the investigating officer. He confirmed too that it was about five metres from point “C”. The evidence of Dudzai Gara reads well. She has no motive to wrongfully or falsely implicate any person in the matter.

The evidence of Dudzai Gara finds corroboration from different quarters. The presence of blood where she indicated to be the place where the deceased was stabbed, as well as confirmation of the clothes which the accused person was wearing on the day in question corroborate her evidence. The deceased’s own evidence is consistent with that of Dudzai Gara in respect of the fact that he ran towards Magunje Inn, which the accused person referred to as Magunje Hotel, after the deceased had been stabbed. The accused’s warned and confirmed statement which was confirmed by the Magistrate also corroborates the evidence of Dudzai Gara that he is the one who stabbed the deceased. His suggestion that he was coerced into making the admissions cannot be believed for the simple reason that when the investigating officer testified it was never suggested to him that the accused had been unduly influenced or put under duress to admit to having stabbed the deceased. The precise nature of the undue influence does not appear from the accused’s evidence. He was not assaulted by any of the police officers. He states that he was threatened with assault. That is not quite a convincing piece of evidence coming from a person who says he had fought bravely when he was under attack by the deceased who was a trained soldier, and was even able to, according to his evidence, skillfully handle the deceased as a shield against any attack by other persons. Also, when the statement was confirmed the accused never challenged it. In his evidence only members of his family were in court. The

police officers were not in the courtroom. His fear that he would be subjected to “further investigation” if he challenged the statement at the confirmation proceedings is inherently unconvincing. The accused also led the investigating officer to the place where he had dropped the bottle which he used to stab the deceased. And the broken bottle was indeed found at that place. The unchallenged evidence of Nobert Mangwiro, which the accused confirmed in his evidence, was that that broken bottle was the only one that was found at the place on the side of the road where the accused led the police officer. The suggestion by the accused that a bigger bottle than the one recovered was used to stab the deceased was based on what the accused said he felt when the bottle was thrown at him. But he never led the police to recover the bottle that was thrown at him.

The accused stated that the deceased was stabbed by one of his colleagues, Matara, who had intended to strike the accused using the same broken bottle. According to the accused the fight with the deceased and his colleague took place at the verandah of Kusemamuriwo Bottle Store, and continued close to the verandah. That would have been the area around the point “L”. He does not suggest that any fight took place after he had crossed the Magunje-Karoi road which is indicated in the sketch plan. However, no traces of blood were found where the accused alleges that the deceased was stabbed. Apart from the accused no other witnesses placed Matara where the deceased and accused fought. The evidence of Admire Muroiwa was that Matara was in a different bottle store and only got to know that the deceased had been stabbed after the stabbing had taken place. It is inconceivable that if Matara was the one who had accidentally stabbed the deceased he would have abandoned him after that to go and drink beer in another bottle store. When the deceased walked to Mukanya Night Club after being stabbed he was by himself. Admire Muroiwa and the others met him outside the premises of Mukanya Night Club. The accused’s version as given in court is therefore unbelievable. After all, he contradicted his statement in the confirmed warned and cautioned statement, which does not just confirm that he is the one who stabbed the deceased but gives the motive for that attack, which was that the deceased had bitten him on his thumb. His explanation about why he did not object to the confirmation of the warned and cautioned statement is equally rejected for the simple reason that he did not lead evidence of any force which was applied upon him to induce him not just to give such a coherent narration of events in which he implicated himself but also failed to challenge its

confirmation or tell any of his relatives who sat in court during the confirmation proceedings. The allegation that he was threatened with assault was an afterthought.

The court therefore finds that the deceased was indeed stabbed by the accused person. Beyond reasonable doubt, the evidence led points to that conclusion and no other. This is a border-line case between murder with actual intent and murder with constructive intent, when one considers the manner in which the attack upon the deceased was executed by the accused. The only factor that appears to work in the accused's favour is that the weapon which he used, the broken glass, was one that he improvised at the scene of the offence, and was not brought by him for the purpose of committing the offence. But the court takes note of how he shaped the broken glass to suit his objective. The accused pursued the deceased for some distance, even crossed a tarred road whilst in hot pursuit, got hold of him and targeted the upper part of the body of the deceased, the neck, and inflicted one heavy blow which caused death within a short time thereafter. The accused person reasonably foresaw the risk or possibility that death might result from his conduct but nonetheless persisted with that conduct. The fact that the accused decided not to go to the police to make a report of the alleged attack upon him and the stabbing of the deceased shows that he appreciated the seriousness of the injury which he had inflicted upon the deceased. Instead of proceeding to the police station the accused chose to go to his residence to sleep.

In the result, the accused is found guilty of murder as defined in s 47(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, legal practitioners for the State
Mugwadi & Associates, accused's legal practitioners