THE STATE
versus
TINASHE KARONGA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26, 27 28, 29 June, 5 July and 5 September 2017

**ASSESSORS:** 1. Mr Msengezi
2. Mr Shenje

**Criminal Trial**

*B Murevanhema,* for the State
*B Mushamiri* for the accused

TSANGA J: The accused was charged with murder. On 19 March 2016 he threw a stone at the deceased who succumbed to his injuries on 21 March 2016. The charge put to the accused was more accurately amended to read as follows:

> "In that on the 19th of March 2016 and at Chinembiri Shop, Patchway, Kadoma, the accused unlawfully and with intent to kill, or realising that there was a risk or possibility that death might result, struck the deceased with a stone on the head thereby causing injuries from which the said Tinashe Mudhara died on the 21st of March 2016".

The accused pleaded not guilty to murder and denied having an intention to kill or foreseeability that his actions would result in death. He pleaded self-defence at the time of throwing the stone.

A day after the incident, being the 20th March 2016, the deceased had been taken to the local clinic. According to the nursing sister Faustina Kapisa who gave evidence in court he had an extremely high temperature then and was not talking. Those who brought him said he had been assaulted. He was also convulsing. She had observed a swelling on the back of his head. She surmised that he had suffered internal bleeding and internal injuries. The high temperature was also indicative of an infection. She had ordered an ambulance for him to be

ferried to hospital. As the ambulance could not come immediately the deceased's family had taken him to hospital themselves. He had later died the following day.

**The State's evidence on circumstances of the case**

**Tawanda Maruza**: He was one of a group of *gure*[1] dancers as was the deceased. On the day in question, the 19th of March 2016, they had performed at Masimba Bottle store from about 2pm in the afternoon till about 1030. They had agreed on a performance fee of $20.00. Instead $15.00 had been paid and given to Greyson Yembekani, one of the group members who in turn had given it to their treasure called Pearson Chizimate. Among the members of the group that had headed home together that day was the said Greyson, together with Pearson the treasurer, the deceased Tinashe Mudhara, his sister Sibongile Mudhara, one Lloyd Mudhara their nephew, and Joseph Zulu the latter's brother in- law and the accused, Tinashe Karonga.

Lloyd Mudhara had enquired why they had been given $15.00 instead of $20.00. He had accused Greyson of taking the other $5.00. He had then demanded that Pearson should give him $5.00 to go and drink. Pearson had refused and a misunderstanding had ensued. Joseph had managed to pull Pearson away which led Lloyd to ask if Joseph had been bought over. Lloyd and Joseph had started quarrelling and at that point the deceased had come and pulled Joseph away whilst his sister Sibongile had taken Lloyd aside. Joseph and Lloyd being brothers- in- law, and it was deemed that a family fight was not proper. It had been a rowdy day for the group and by that time a number of fights had already erupted among them during the course of that day.

At the time when the deceased and Sibongile were trying to quell the fight which was about to take place, the accused Tinashe Karonga had, according to the witness, indicated that Sibongile was in fact the one causing all the misunderstandings among the group. Sibongile had then manhandled the accused by the collar. Angered by her action the accused had started physically assaulting Sibongile. The deceased had come running from where he was with Joseph and as he run towards Sibongile and the accused who were fighting. As he ran towards them he had been struck by a stone by the accused.

The witness told the court had seen the stone being thrown and furthermore the accused had thereafter gone to the police and admitted that he had indeed thrown a stone at

[1] These are colourfully masked dancers whose culture originates from Malawi. The dance is part of a secret religion among the Chewa people. They dance to the beat of a drum.

the deceased. In cross examination he maintained that only one stone had been thrown by the accused and that he had not seen any other stones being thrown by anyone else. He agreed that the group had been drinking that day. He was also unable to say the deceased's intention in moving towards the accused had been and neither could he say if the accused had been defending himself. What he could stand by was that one stone had been thrown and it had been thrown by the accused. In accused's actions in going to the police, he said that the accused did not do so because he was running away from being assaulted but because he wanted the evidence of striking the deceased with a stone to come to come directly from him as opposed to coming from the others.

**Lloyd Mudhara**: He was the one who had been initially involved in a scuffle with Joseph gave his evidence. The deceased was his uncle. Sibongile was his aunt. The accused belonged to the same culture as them. His version was that when Sibongile took him aside at the time that the deceased had taken Joseph Zulu aside, the accused had asked Sibongile why she was intervening and that she should instead let the two fight. The accused had started assaulting Sibongile and fighting had ensued. He therefore corroborated Tawanda's evidence that the accused had started the actual physical fight with Sibongile. His evidence was the same as the last witness's regarding the fact that the deceased had run towards the two and had been struck by a stone as he was doing so. As the deceased moved towards them he had asked why the accused was beating his sister. He had observed the accused picking the stone because of the light. He had however not seen the size of the stone, although he described the stone as a grey stone. He did not know if the intention had been to strike Sibongile as she was the one fighting with the accused or to strike the deceased with the stone. He had not seen anyone else throw a stone other than the accused. In cross examination, he challenged as untrue the defence version that the deceased had thrown a stone.

**Sibongile Mudhara:** Her evidence corroborated that of Lloyd. Her fight with the accused had been specifically about the fact that she had pulled Lloyd away from Joseph and the accused had been of the view that she should have let them fight. She further told the court that the accused had been the first to assault her. She had not thrown stones at the accused. She could not say what the deceased's intentions had been in running towards them.

**Joseph Zulu:** The evidence of Joseph Zulu which was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It corroborated the evidence of Lloyd

and Sibongile on the aspect that the accused had asked Sibongile Mudhara why she was stopping the fight. He had also not seen the deceased throwing a stone at the accused.

**Ngonidzashe Mutanana**. He is an Assistant Inspector with ZRP. At the police base which falls under Kadoma Rural, he had recovered the stone used at the scene by the accused from Constable Mustafa. The stone weighed 3.7kgs, its weight having been confirmed at the post office and a certificate had been issued. He had shown the stone to the accused when recording the warned and cautioned statement. The accused had admitted to having used the stone. The accused had also been taken for indications. He agreed to go for indications and at the scene he had indicated where he was standing when he picked up the stone, and, where the deceased had been standing at the time he was struck. The indications had been done on 21 March the day the deceased died. Constable Sibanda and Greyson Yembekani were also present and had all signed the document with the accused having followed the requisite procedures. Of significance is that the map with the indications was accepted as evidence by consent as exh 2 as having been freely and voluntarily made.

He had also recorded a warned and cautioned statement from the accused which was admitted in evidence in terms of s 256(2) as it had been confirmed by a magistrate. It had been made freely and voluntarily and had been witnessed by a Constable Sibanda. The warned and cautioned statement was part of the evidence having been admitted in terms of s 256 (2) the Criminal Evidence and Procedure Act.

He told the court that he had seen the deceased at Kadoma General Hospital and that he had a scar on his forehead and had blood flowing to his chest. He also said from his investigations it would seem that there had been a fight between the accused and the deceased. On whether it had emerged during the investigations that the deceased had thrown a stone at the accused he said this had not emerged. What had emerged was that the accused had said that the deceased had attacked him.

**The accused's evidence**

He testified that Sibongile had indeed stopped Lloyd Mdhara and Joseph Zulu from fighting. However, thereafter she had remained talking to Lloyd's younger brother Edmore. He had gone away to fetch a bag and when he returned Sibongile was still talking to Edmore. He had remarked then that she was the one causing the fights. She had told him not to intervene. That was how the fight had started. The deceased had come and enquired why he

was fighting his sister. Accused had started fighting the deceased using his hands, Sibongile and Joseph had also joined in the fight against him. Greyson had tried to stop the fight. The deceased had thrown a stone at him which had hit his chest. Sibongile had also thrown a stone at him. He had runaway and they had followed him in hot pursuit. He had picked up a stone and thrown it and had not realised that he had hit a person. That is when he had run to Patchway police base to explain that the others had ganged up against him. He had explained to the police that he had hit someone but that he did not know whom he had hit. Within a short space of time the others had arrived at the police base. It was then that he learnt that the stone he had thrown had hit the deceased. He had learnt the following morning back at the police base that the deceased had deteriorated and died. He confirmed that the alleged stone had been brought to the police base the previous day by Joseph Zulu.

This version was somewhat different from that in his warned and cautioned statement in which he said that the deceased had thrown a stone which had not hit him and that it was Sibongile who had hit him with a stone on the chest. In cross examination, he confirmed that he had indeed taken the police for indications. The state queried his version on the basis that the map from the indications which had been admitted as evidence by consent did not at all tally with his version that he had been chased. It did not contain any such evidence and none of this had been queried with the investigation officer when he gave his evidence. The accused also agreed in cross examination that no witness had testified that he the accused, had been assaulted by the deceased during that time that the accused had thrown a stone at him. Whilst the stone produced in court was the one Joseph Zulu had taken to the police he said that the one he had actually used was a much smaller one which could fit in his palm. He also acknowledged in cross examination that the accused was in good health that day. He could walk. He could dance and he could talk. Whilst they had been drinking that day, he equally acknowledged in cross examination that they knew what they were doing.

**Legal submissions**

The State dismissed the accused's defence argument on the basis that there was absolutely no proof that he was going to be attacked. Mr *Murevanhema* argued that it was quite clear that whatever was in the accused's mind was putative self-defence but that it was difficult to prove self-defence when accused failed to prove that he thought he was going to be attacked. The fight had been between him and Sibongile and the accused and the deceased.

The State urged the court to arrive at a proper verdict taking into account the weapon used, the part of the body hit and the mind of the accused at the time when he threw the stone. In so far as the accused's evidence departed somewhat from the warned and cautioned statement and defence outline, the State relied on the case of *S* v *Mhandwe* 1993(2) ZLR 233 regarding the adverse inferences to be drawn.

The gist of the submission on accused's behalf was whether he had intended to kill the deceased when he struck him with the stone. Much of the submissions related to issues of factual findings which are addressed more fully below.

**Factual findings**

From the above evidence we found the following to be true.

The accused had been involved in a fight with Sibongile. The witnesses on the scene were not *ad idem* on the cause of the fight between Sibongile and the accused. Although all acknowledged that the accused is the one who had assaulted Sibongile, Tawanda said Sibongile had been accused of fuelling the disputes that night and had then pushed the accused. Lloyd, Sibongile and Joseph's versions were different in that they said the accused had been angered by the fact that Sibongile had stopped Lloyd and Joseph from proceeding with their aggression. What we found in the final analysis was that it was the accused who had initiated the physical fight. On that score all witnesses at the scene were in agreement. He had thrown a stone at the deceased as he moved towards them. The only stone thrown had come from the accused. That stone had hit the deceased on the head and he had died as a result of that injury. These were our findings.

The testimonies of all three witnesses who were at the scene that day also did not point to the accused having been involved in a fight with the deceased at all that day. While the investigation officer said that from the investigations it seemed that there had been a fight between the accused and the deceased and that the misunderstandings included other state witnesses, he spoke at a level of generality of the events of that day. Furthermore, he distinctly couched his response in the form of an opinion arising out of the investigations as opposed to an actual finding of fact regarding a fight between the accused and the deceased. In other words, he did not say there was definitely a fight between the accused and the deceased that day. He put it thus:

> "From investigations **it would seem** there was a fight between the deceased and the accused. The misunderstanding included other witnesses. The accused and the other gure dancers were coming from a gure dance as dancers."

We found that the Investigation Officer's testimony about having observed the deceased bleeding from the forehead could not have been true. Our conclusion was that either he was now simply rehashing a scenario from his own foggy memory or was simply confusing this case with another case. The post-mortem report which was admitted in evidence as exhibit No. 5 was explicit as to the cause of death being due to subdural haematoma, depressed skull fracture and head trauma. We had no reason to disregard the findings of the report in the absence of contrary medical opinions to dislodge its findings. It was also not in dispute from the rest of the witnesses including the accused himself that the deceased had suffered head injuries. The nurse too had not seen any injury to the forehead. Sibongile too testified that when he fell he had fallen on his stomach and hit his forehead but had not bled.

**The law and factual analysis**

In the final analysis what this court was faced with was decision on whether the accused was guilty of murder in recklessly striking the deceased with that stone despite the risk. The type of murder which the State asked the court to find in this case under s 47 (1) (b) of the Criminal Code which in simple terms, is founded on the accused's actions betraying a high degree of recklessness and indifference to the value of human life in his conduct even whilst realising that death will result. The test is objective.

The accused proffered self-defence as the reasonable explanation for his conduct. The accused admitted to throwing the stone which is incriminatory but said he did so under self-defence- which is exculpatory. The Criminal Code is explicit in terms of what has to be satisfied under the defence of self-defence. In summary our Criminal Code in s 253 requires that there must be an unlawful attack; that attack must be directed upon an accused person or upon a third party; the attack must have commenced or be imminent; the action taken must be necessary to avert the attack and the means used to avert the attack must be reasonable.

To elucidate further:

> "The use of force is not reasonable if it is not necessary. For the use of force to be necessary it is required that the danger or threat which the accused apprehends must be sufficiently specific and imminent, and must be such that it could not be reasonably met without resorting to force.' This, however, does not mean that a person cannot use force before an attack

> actually takes place. As Lord Griffiths remarked in *Beckford*, 'a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike'."[2]

It is each of these requirements that are to be examined closely in a case where the defence is raised. *See S* v *Tamolin Lamola* HH 144-15. In the absence of justifiable circumstances such as self-defence the accused is guilty of murder based on foreseeability. By relying on self-defence the accused was in fact tacitly accepting that he committed the murder but justifying his actions on the need to defend himself. The facts are to be ascertained from the evidence.

What was clear from the evidence was that the accused was not under an unlawful attack from the deceased himself. He was in a situation of his own making having assaulted Sibongile physically as all the state witnesses present that day testified. Furthermore, all three state witnesses who were at the scene, namely Tawanda, Lloyd, and Sibongile were categorical in their evidence that the deceased had been struck with a stone whilst running towards Sibongile and the accused who were fighting. He had not yet reached them when he was struck. We accepted this evidence as a truthful account of what had happened.

However, they were less categorical as to what the deceased's intentions were. Sibongile herself when asked by the State said she did not know whether his intention was to intervene in the fight or to restrain them from fighting. What we know is that he had certainly played a peace making role earlier on that night. Lloyd stated that the deceased had asked why the accused was fighting his sister. At most it would therefore appear that in throwing the stone the accused simply took a pre-emptive strike but not that he was under any attack from the deceased. The State has not proved beyond reasonable doubt that the accused's murdered the deceased through reckless abandon of foreseeable consequences.

Recklessness and foreseeability were expressed thus in the case of in *Director of Public Prosecutions, Gauteng* v *Pistorius* as follows:

> '. . . [A] person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore "gambling" as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act "reckless as to the consequences" (a phrase that has caused some confusion as some have interpreted it to mean

[2] George Mousourakis, Excessive Self-Defence and Criminal Liability, 12 S. Afr. J. Crim. Just. 143, 154 (1999)

> with gross negligence) or must have been "reconciled" with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.' [3]

*In casu* to prove murder under s 47 (1) (b) the State had to prove beyond a reasonable doubt that (a) the accused had had the subjective foresight of the possibility that striking the deceased with the stone would cause his death (b) that the accused had 'a disregard of that consequence' and had in fact reconciled himself with the foreseen possibility.

The accused's belief that he was under an imminent attack had the deceased reached him may not have been entirely unreasonable since the facts are not conclusive. What is more certain is that the accused certainly acted negligently and excessively in using a 3 kg stone to attack the deceased. Even if he says that he used a smaller stone, which the state successfully refuted, there is no doubt that the use of stone to avert an attack is inherently deadly. Attacks to the head with stones are almost always fatal particularly when the stone in thrust in a combative manner. In *S* v *Nicholas Mutendera* HMA 02-17 the accused struck the deceased on the right ear lobe with a stone. The deceased collapsed, bled profusely and was unconscious and later died. The stone had weighed 1.99 kgs. The accused had pleaded self-defence and this was rejected on the factual circumstances. He was ultimately convicted of culpable homicide on the basis that he lacked the necessary *mens rea* as he was intoxicated and the crime he was facing required intent.

*In casu* the accused has stated that whilst they had all drunk that day they knew what they were doing. His intoxication was never his defence. The accused in the Mutendera case received a sentence of 8 years of which three were suspended.

*S* v *Tamolin Lamola* HH 144-15 is another case in which a stone had also been used by the accused on the deceased. Again, self-defence was raised and rejected. The means used to avert the attack were deemed unreasonable and also the accused was found not to have faced any imminent attack. His life was deemed not to have been in danger. See also *Paradzai* v *Chanyonda* HH 168-17 for another example of the deathly consequences of stone throwing acts.

[3] *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204; [2016] 1 All SA 346 (SCA) para 26.

Ordinarily where self-defence fails then an accused is guilty of murder. As in the *Lamola* case above this is indeed a border line case between murder and culpable homicide. In terms of acceptance of plea of culpable homicide in such cases involving a blow to the head with the stone see *S* v *Callup Sibanda* HB 216-15. In summary, there was no unlawful attack from the deceased which was directed upon the accused. The deceased was running towards the fighting pair but his intention were not clear. It therefore cannot be said that the action taken by the deceased in throwing the stone was necessary to avert the attack. What is clear is that the deceased may at most have feared an attack and had taken a pre-emptive strike. What complicates the picture for the accused in this instance is no one knows for sure that he would not have been attacked by the deceased.

**Verdict**: The accused is found guilty of culpable homicide.

**Mitigation and aggravation**

It was submitted that the accused is a first offender aged 22 years old. He had recently married. He has also been in custody for nine months. The court was also urged to bear in mind that in cases of culpable homicide the accused is not being punished for evil intent but rather to inculcate caution in citizens regarding their conduct. *S* v *Richards 2001 (1) 129 (S).*

In aggravation the State pointed to the high degree of negligence and moral blameworthiness on the part of the accused in the commission of the offence in this case. Also emphasised was the needless loss of a life through violence. It was argued that a non-custodial sentence would trivialise the matter. The deceased too had a family to look after and as such the State argued that the sentence should be a balancing act. The State pointed to the *State* v *Louis Moyo* HB 90-12 where acts of violence by today's youth was roundly condemned and the accused received an 8 year sentence of which 3 years were suspended. Taking into account that the accused has been in custody for 9 months the State argued that a seven year sentence would be appropriate.

**Reasons for sentence**

This court notes that in the case of *S* v *Nicholas Mutendera* discussed in the body of the judgment, a sentence of 8 years with 3 years suspended was passed for a culpable death resulting from stone throwing. In *S* v *Tamolin Lamola* also discussed, the effective sentence was two years taking into account the amount of time the accused had already spent in custody.

The accused's time in prison is a factor to be considered. Also this court has taken into account that the accused and other members of the group had been drinking that night and that voluntary intoxication can be considered when it comes to sentencing. Given that he is aged 22 the court is of the view that it must exercise care in ensuring that it does not unwittingly turn him into a hardened criminal by levelling too harsh a sentence. The accused is sentenced as follows:

> 6 years imprisonment of which 3 years is suspended for a period of 5 years during which time the accused should not be convicted of any offence involving violence.

**Effective sentence: 3 years imprisonment**

*National Prosecuting Authority,* State's legal practitioners
*Harare Law Chambers of Advocates,* Accused's legal practitioners