

THE STATE  
versus  
FELIX TENGERA

HIGH COURT OF ZIMBABWE  
BACHI MZAWAZI J  
CHINHOYI, 6 March to 13 March 2024.

Assessors: *1. Mr. Mutombwa*  
*2. Mr. Kamanga*

### **Criminal Trial**

*G. T. Dhamusi*, for the State  
*L. G. Ndhlovu*, for the accused

**BACHI MZAWAZI J:** This is a matter involving a fight amongst small scale illegal gold panners over gold ore. Always common in these fights is the use of sharp knives with fatal consequences. What has emerged from this saga is that the accused and his friend Tauya Chitembetembe arrived at a gold hammermill at Glassgow Compound, Kadoma, on the 3<sup>rd</sup> of March 2022 to toast their gold ore. Upon arrival they found the deceased already processing his own gold ore in the company of several others. This area is housed within some building and divided by a thatched hedge. One side is where the toasting is done whilst the other is where the preliminary processing steps are undertaken.

Upon their arrival, the two found the deceased looking for his gold ore which had gone missing while toasting. He charged from the fire toasting side to where the accused and his friend were, accusing them of stealing his gold. He had been incensed by the disappearance of his ore and menacingly pounced at Tauya with a shovel. The first State witness to testify, Tendai Gosa, attested that the situation was volatile and he restrained himself from interfering lest he would be caught in the cross fire.

The second State witness, Felix Nyamanhindi, also alluded to the same fact that the deceased refused to be calmed and he too withdrew in his shell for fear of being harmed. He also witnessed the deceased furiously approaching Tauya and the accused holding the shovel.

Both State witnesses attested that the two accused and his companion were standing side by side and the deceased attacked Tauya on the hand. A struggle between Tauya and the deceased ensued for the possession of the shovel.

The rest of the State evidence produced by consent does not depart materially from what was orally led in court. The evidence of the two witnesses was consistent, independent and credible. The deceased is said to have been infuriated by the two protagonists' joke over his loss and their comment on the purchase of some beer if they assist in locating the missing gold ore nugget. The deceased then threatened to get all the gold ore belonging to the accused's team.

We are told that, in the midst of the wrestling storm for the shovel, the accused pulled a knife and stabbed the deceased once at the left side upper back, just below the rib cage. This blow weakened the deceased who then let go of the shovel and staggered out of the room cum shed. The accused and his friend also left the scene. The deceased did not go far as he was bleeding profusely. He then collapsed and died before any medical assistance was rendered. This led to the arrest of the accused and these charges of murder, in contravention of s47 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The autopsy report admitted into evidence amongst other documentary exhibits by consent, confirmed the cause of death as hemothorax, laceration of the pulmonary vein.

The accused person pleaded defence of a third party. He stated that he acted at the spur of the moment after noticing the deceased attacking his friend with any equally dangerous object, the spade. In their closing

submissions, the defence counsel, prayed for an acquittal stating that the accused person is well shielded by the defence of a third party. They submitted that, there was an unlawful attack which is obvious from the chronology of events above. The unlawful attack had commenced. From their own perspective the method or means to avert the attack was proportionate to the attack. In addition, they opine that since this was an unprovoked attack with little room to think and process what was rapidly unfolding there was no other way the accused would have averted the attack. In that regard, they advert that all the essential requirements of the defence as outlined in s253 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] have been met.

From the other angle, *Mr Dhamusi* for the State does admit that the facts do not disclose murder with either actual and constructive intent. The least they could vie for is culpable homicide. It is the State's averment, that discernibly the deceased provoked the situation. Whilst provocation is not a full defence in murder they urge the court to consider it as sufficient to reduce the offence to culpable homicide.

In their view, though the intervention of the accused was inevitable given the manner the deceased attacked his companion and the threats to dispossess them of their gold ore, it is the means he used to avert the attack which is questionable in the circumstances. The State argues that the use of a knife was uncalled for. As such, the knife was not proportionate to the attack as the two opponents were struggling to disarm and repossess, respectively, the weapon which had been initially used. There was no danger or threat that was posed to Tauya at the time the accused meddled in that fight. Thus, the State contends that the accused was negligent in his use of the knife in defence of a third party and should be liable to a conviction on culpable homicide.

On assessment, it is clear that the accused person a young teenager aged 19 years at the time acted rushedly and impulsively when he

stabbed the deceased once at the back in defence of his friend and his gold ore. Further, his confirmed warned and cautioned statement adduced by consent detail that accused acted in defence of property in the form of his gold that had been threatened by the deceased. This point was not taken up in his defence in court but cannot be ignored. However, in that statement he never mentioned the defence of a third party or preemptive strike in view of impending danger.

From that angle, the sole question for determination is whether the accused's defence of a third party and of property has been satisfied. It is recognized at law that self defence, third party or property can a complete or partial defence in terms of s253 of the Criminal Law Code. The essential elements common to the defence of property, the self and third party are, on an unlawful attack or imminent conduct necessary to avert the attack the reasonable means to avert the attack. Section 252 (2) enjoins the court to take into account the circumstances of accused in that situation, his fears and beliefs. Defence to property is outlined in s257.

*See State v Chirwa 66/2023, State v Regai Mukodzi HCC26/23 and State v Humphrey Gara HCC55/23. State v Kanyawa HH104-10 and S v Charuma HH103/10.*

In casu, that there was an unlawful real attack is unquestionable. That there was threate to property is evident. However, the accused was not justified in using a knife to stab a person who was only wrestling the weapon with his friend. It is true, there was no anticipating what was going to happen next, but the use of a knife was unwarranted. Therefore, the weapon used to avert the attack was disproportionate. He was negligent in stabbing a person in the back. Death should have been reasonably foreseeably before stabbing a person with a knife on a delicate part of the body.

His degree of negligence is more exacerbated by the fact that he had time to retrieve the knife from where it was ordinarily kept out of sight and then after the act had the guts to conceal it in the bush elsewhere. This illustrates that he had plenty of time to regurgitate his actions before and after.

From the above perspective, accused is accordingly, found not guilty of murder in contravention of s47 (1), but guilty of culpable homicide.

In sentencing the accused, the court has taken into account the victim impact statement drawn from witnesses in the witness stands and from produced affidavits. In accused's favour is his age at the time of the commission of the offence. He acted as an immature impulsive teenager, 19. Sight can also not be lost that the deceased provoked the situation. The court has also been told that the accused came from a broken home. He was orphaned at a tender age. His family's livelihood depends on artisanal mining. His mother is also into that field. He is a first offender. He showed contrition and remorse throughout the trial. The defence counsel *Ms Ndlovhu* urged the court to consider the imposition of a fine or community service citing the cases of *State v Mukarati MHA 10/2016* and *State v Mukumba & Anor HH 385/23*.

On the other hand, the State addressed the plight of the family that had been visited with the loss of a loved one, the siblings and relatives of the deceased. Young life was terminated prematurely over trivialities. *Mr Dhamusi*, for the State emphasized that the weapon of choice used by the accused was dangerous and fatal. In aggravation, we have also taken note of the fact that the accused's family did not make efforts to pay the traditional reparations or make funeral contributions, two years down the line.

In our further assessment, we agree with *Mr Dhamusi* that a dangerous knife was used with fatal results. Life is sacrosanct. There is unchecked rampant use of dangerous knives and weapons by people in artisanal mining communities to settle disputes and scores. This must cease.

We have also considered that the likely maximum fine in offences of this nature is US\$400.00. Can this be equated to the loss of human life? No. It will actually send a wrong signal and perpetuate such callous and wanton killings. Therefore, the defence counsel's submission and a call for a fine will be an affront to justice.

In the same breathe, community service will also fail to send the right deterrent message to such communities. In essence, imposing a sentence of community service will undermine the society's confidence in the justice delivery system and the judiciary as a whole. That being the case, in striking a balance between the interests of society, the accused and the victim, we are of the view that community service is inappropriate given the circumstances of this case.

In counterbalancing the need to temper justice with mercy and the tenet that punishment is not meant to break but to reform and rehabilitate, given the accused's personal factors and circumstances surrounding the commission of the offence, a short custodial sentence meets the justice of the case. The age of the accused at the time of the commission of the offence has played a significant role in swaying the court to impose a reduced custodial term.

Accordingly, the Accused person is sentenced to 3 years imprisonment with 1 ½ years suspended for 5 years on condition accused does not commit offences involving violence, assaults or murder upon which if convicted will be imprisoned without the option of a fine. 1 ½ years are effective.

*National Prosecuting Authority for the State.*

*W. O. M Simango & Associates for the accused.*