THE STATE
versus
CLEOPAS KUMIRE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 12 May & 24 October 2023

Assessors: Mr Barwa
Mr Jemwa

Criminal Trial

K Chigwedere, for the State
K T M Mukanganwi, for the accused

MUTEVEDZI J: "I will beat you until you are healed of your epilepsy!" Those words were the crude statement that the deceased told the accused who indeed is an epilepsy patient. It is not always easy to achieve emotional distance in the face of such extreme provocation. Whether he was under the influence of illicit alcohol or some other substance the provocateur who became the deceased in this murder used unrestrained language to mock the accused. He got killed in the end.

The prosecution alleged that on 30 January 2022 at Gazaland Shopping centre, in Harare, Cleopas Kumire (the accused) unlawfully and with intent to kill or realising that there was a real risk or possibility that his actions could cause death but persisting with his conduct despite that realisation, assaulted Wilson Chiyadzwa (the deceased) on the head, on one of his hands and on the chest several times with a wooden plank. The deceased succumbed to injuries sustained from the assault. In detail, the narrative is that on 30 January 2022, the deceased who was a security guard of sorts at a car park in front of Gore sports bar at Gazaland approached the accused and demanded from him USD $60 which he alleged the accused owed in parking and security fees relating to his Mitsubishi Pajero vehicle. The accused protested. He accused the deceased of renting the vehicle for use by commercial sex workers during the night. The accused then picked a wooden plank from the vehicle with which he struck the deceased as earlier indicated. The deceased ran into the sanctuary of Gore sports bar. On the morning of

31 January 2022, Tstisi Matanhire and Walter Muchingami checked on the deceased's health. They found him seated on the front passenger seat of one of the vehicles he guarded. His condition had deteriorated. Sadly he passed on moments later. An autopsy conducted by the pathologist who examined his remains concluded that his death was a result of severe head trauma due to head injuries.

The accused pleaded not guilty to the charge. His defence was that on the day in question he and the deceased had a misunderstanding regarding the deceased's use of a motor vehicle he (accused) was repairing as a brothel for commercial sex workers at night. The deceased had the duty to secure the car. For that service he demanded USD $60 from the accused. The accused further advised the deceased that he was simply repairing the car and that if he was owed any money he had to demand it from the owner of the car. The deceased was drinking and was drunk. He suddenly attacked the accused by grabbing him by the neck and throttling him. As he did so, he mocked the accused as being unfit because he suffered from fits which caused him seizures and convulsions. The deceased was refrained from his actions. He relented but was soon back to push and shove the accused in a violent manner. The accused said he got angry. He retrieved a wooden plank which was in the vehicle and using his left hand struck the deceased once on the right shoulder and once on the back. He said he attacked the deceased to protect himself from further harm by the deceased who was intoxicated and violent. His intention was simply to scare away the deceased. He succeeded because the deceased immediately fled into Gore sports bar. Later on the deceased had actually returned to the accused and apologised for his inconsiderate and unbecoming behaviour which had led to the misunderstanding. The accused further argued that the deceased had not suffered serious injuries from the assault as indicated by the fact that he neither saw it necessary to seek medical attention nor to make a police report. Instead he sought reconciliation with the accused and continued drinking beer. When he left the place, the accused said the deceased was in a good state of health. He added that anything could have later happened to the deceased because he was well known for his violent behaviour. His moniker "Gunners" was actually derived from those violent tendencies. He said there is a possibility that the deceased could have been assaulted by other persons later on in the night of that day. He further protested that there was no causal connection between the deceased's death and the fight they had engaged in earlier. He prayed for his acquittal.

The state's case

The prosecution opened its case by applying to tender with the consent of the defence, the autopsy report compiled by Doctor Laurelien Malagai Martinez, a forensic pathologist based at Harare Hospital. He concluded that death resulted from brain damage, subarachnoid haemorrhage in right severe and head trauma. In relation to the surface injuries the pathologist observed that the deceased had what he termed haemorrhagic infiltrate in right eye which increased in size in the right temporal region. The skull was not fractured. The autopsy report became exhibit 1.

The prosecutor thereafter applied for the formal admission into evidence of the testimonies of witnesses Elton Chitsange and George Chikweva in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Code). The defence did not object. The testimonies were formally admitted as they are described in the state's summary of evidence. **Elton Chitsange's** evidence was that on the fateful day, the deceased had approached him at around 1500 hours. He appeared unusually distressed and advised him that the accused had assaulted him with a wooden stick three times on the head, on the neck and in the abdomen. He had last seen the deceased seated on the front passenger seat of the Mitsubishi Pajero car. The next morning he got back to his workplace only to learn that the deceased wasn't well. He opened the door of the car. The deceased fell from where he was sitting to the ground. He lifted him back into the car. The deceased died moments later. **George Chikweva's** evidence was to the effect that he is a police officer and was the detail who attended the scene first. He found the deceased lying dead on the front passenger seat of the vehicle. The lower part of his body was on the vehicle floor whilst the upper part was on the seat and the head was facing the driver's seat. He observed that the deceased's body was swollen above the right ear, the left side of the rib cage and had bruises and swellings above the groin area. The body had bloodstains on the mouth.

Tsitsi Matanhire

She works at a restaurant located in front of Gore sports bar close to the parking lot where the assault took place. She knew the accused as a mechanic at the shopping centre and the deceased only as Gunners. She didn't know his real name. She stated in her evidence that on the day in question the deceased approached the accused who was working on a vehicle and demanded $60 from him. The accused rebuffed him and alleged that the deceased had a habit of bringing prostitutes into the car. The accused then assaulted the deceased. He did so with a plank, two times on the right side of the head and three times on the right side of the ribs. She

said the plank which the accused used was about 60 cm long. It had an edge and was smoothly planed. She was shown a plank in court which she said she thought was the same one used by the accused to assault the deceased. Immediately after the assault the deceased fled from the scene. The witness said he asked the deceased who indicated to her that he was in pain. She only saw him again the following morning around 0700 hours. He could barely talk. He was wriggling and appeared in severe pain. He was seated inside a vehicle. She called him out but he did not respond. His head was swollen on the right side on the same spot where the accused had assaulted him. She held his hand trying to feel his pulse. He passed on. When she was asked if anything else could have happened to the deceased she said she wouldn't have known. She also said she didn't know if the deceased was drunk or not but denied that he had attacked the accused. She also denied that the deceased was a violent person. The thrust of cross examination which counsel for the accused adopted was slanted towards discrediting the witness's observations. He suggested that between the spot where the assault took place and the witness's workplace there were many cars parked which obstructed her observation of what occurred. She admitted there were but denied that they obstructed her view. She said the distance between the place of assault and where she was, was only about ten metres. She however accepted that she did not hear the conversation which went on between the accused and the deceased. Contrary to the accused's version that the brawl remained at the Pajero vehicle, the witness said she actually saw the accused chasing the deceased as he fled the scene.

Walter Muchingami

He works as a motor mechanic at Gazaland shops. He said he knew the accused as they used to assist each other as mechanics. He intimated that he knew that the accused and the deceased were friends. On the day in question he arrived at the parking lot and witnessed accused quarrelling with the deceased. The argument was about money. It was exactly as explained by everyone else. During the argument the witness said the deceased then insulted the accused by alluding to an ailment which the accused suffers from. He stated that he knows for sure that the accused suffers with a disease commonly called epilepsy. The deceased said that he could beat the accused until he was healed of his epileptic condition. The accused then assaulted the deceased with a plank. The deceased ran away but later returned. The witness said he inquired from him why he hadn't gone to the police to report. His response was that the accused and he had amicably solved the issue. On the assault the witness indicated that the deceased was assaulted once around the neck area, once around the ribs and three times around the mid-section of the body. The witness said he was not amused by the commotion that both

of them had caused at the workplace. Importantly, he also stated that he did not think that the accused ever intended to kill the deceased. If anything the accused thought he was disciplining his wayward friend. In his opinion the accused did not use force although there were visible marks on the occipital area and one of the arms. Both of them agreed that the matter was over. The three of them spend the rest of the day together. He added that he agreed that the deceased had been the aggressor in that although he hadn't physically assaulted the accused he had used very threatening words towards him. He equally said there was no basis for the accused to have chased the deceased as he ran away because he had earlier cautioned both of them against fighting. On the alleged murder weapon, the witness said it wasn't thick because the accused actually grabbed it in one hand. It was about a metre long. Although he said he had not closely examine the plank he thought the one he was shown in court was similar to the plank which accused had used. Under cross examination, he admitted that the deceased was nicknamed Gunners because he was stubborn and could speak to anyone without regard to how the other person felt. He also accepted that the deceased was intoxicated and was actually drinking an illicit beer called 'saints.' He maintained that what got the accused angry was the deceased's reference to the accused's health condition. After the fight the deceased was talking normally. He did not appear like someone who needed medical attention. In the morning when the deceased passed on, the witness said he saw two bottles of the illicit beer in the car. The deceased fell from the car and landed on his head.

Abel Chikuni

He was the investigating officer in the case. He attended the scene. His description of it and the state in which they found the deceased was similar to that of George Chikweva. It was through him that the prosecutor produced the wooden plank allegedly used to commit the murder. It became exhibit 2. It is 80 cm long and weighs 250 grams. He also drew a sketch plan which was admitted as exhibit 3. Nothing significant came out the cross examination of the police officer.

With the above, the prosecutor closed her case.

Defence Case

Cleopas Kumire's evidence

His evidence was in synch with his defence outline. He emphasised that he is an epileptic patient and that the deceased provoked him by taunting him about his illness. The deceased had said he could assault the accused until his epileptic condition disappeared. The accused

said he lost self-control at that stage and grabbed the deceased with the intention to manhandle him. Walter then restrained him and at the same time ordered the deceased to go away. The deceased complied momentarily but returned with more violence. He was drunk. The accused then added a significant detail which was absent from his defence outline in that the deceased picked an empty beer bottle with which he intended to strike him. At that moment the accused said he retrieved a plank which was used as a pivot when opening the car's boot lid. He said he is left handed and with that hand he struck the accused's head once with the plank. The deceased charged at him. The accused raised the plank once more and struck the deceased on the arm. The deceased fled. The accused argued that he simply intended to scare away the deceased because he had provoked him, was drunk, was disturbing his work progress and attracting unnecessary attention to the workplace. He said he used moderate force and never intended to kill the deceased. He disputed that exhibit 2 was the weapon he used. He alleged that the plank he used was smaller as it was simply used to support the boot of the car. He added that when the deceased ran off he went into Gore Sports bar where the patrons jeered him. The jeers were motivated by the deceased's previous bragging that he would never lose a fight. The deceased later returned and apologised for his conduct. He said he regretted what had happened. The accused said he did not notice any injuries on the deceased. He admitted that he assaulted the deceased but never had the intention to injure let alone kill him. Under cross examination it was suggested to him that his story about the deceased having threatened him with a bottle wasn't true because both Tistsi and Walter who had witnessed the altercation were adamant that the deceased had not physically attacked him. His response was that it was possible they had not seen that but it had happened.

Common cause issues

1. The deceased was in one way or another contracted to ensure the safety of a motor vehicle which the accused was repairing
2. A misunderstanding arose from the misuse by the deceased of the motor vehicle and the payment for the deceased's services. The accused refused to pay.
3. The deceased insulted the accused by taunting him about his epileptic health condition
4. The accused then assaulted the deceased on the day in question. He used the wooden plank which was produced in court as an exhibit. His arguments that it was not the same plank were palpably in vain. The descriptions which he gave and those given by other

witnesses all made exhibit 2 particularly similar to the one allegedly used by the accused.

5. After the assault, the deceased came back to the accused. He apologised for his unbecoming conduct. He refused to report the incident to the police because he believed it was nothing serious.
6. The accused and the deceased were regarded as friends

Issues for determination

The accused's defence is essentially that he was provoked by the accused and when he acted he had no intention to harm let alone kill the deceased. His contention that there was no causal connection between the assault and the death was clearly not a serious one as illustrated by his failure to advance that defence during the trial. The post mortem report was admitted without argument about the cause of death. The injuries observed by the pathologist were consistent with the assault and the areas which were targeted during the assault. The issues which arise for resolution are therefore:

a. Whether the defence of provocation is available to the accused and
b. If it is whether he had the intention to kill the deceased

The defence of provocation

In relation to all other crimes except murder, it is in essence a misnomer to regard provocation

as a defence. It used to be a defence to specific intent crimes at common law but that position was reversed by the Criminal Law Code which provides in s 238 that:

238 Provocation in relation to crimes other than murder

> "Except as provided in section two hundred and thirty nine, and subject to any other enactment, provocation shall not be a defence to a crime but the court may regard it as mitigatory when assessing the sentence to be imposed for the crime."

S 239 of the Criminal Law Code however makes provocation a partial defence for the crime of murder. It states that

> 1. If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted, as the case may be, with the intention or realization referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation—
> (a) he or she does not have the intention or realisation referred to in section forty-seven; or

(b) he or she has the intention or realization referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.

(2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that—

(a) he or she did have the intention or realization referred to in section forty-seven; or

(b) the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control;

the accused shall not be entitled to a partial defence in terms of subsection (1) but the court may regard the provocation as mitigatory as provided for in section two hundred and thirty-eight."

It needs no explanation that for the defence to hold there is need for a court to find that the accused was indeed provoked. The test does not however end there. Instead, the further requirement is that the conduct constituting the provocation must have been so intense that a reasonable person in the position and circumstances of the accused would lose self-control and act in the manner that the accused did. See the cases of *S* v *Kashiri* HMT 13/18, *S* v *Thsuma* HB 171/22 and *S* v *Machokoto* HH 461/23. The reasonable man test can however be problematic. The defence is characterised by suddenness and spontaneity. The accused person must have acted without opportunity to think. In other words he acted in the heat of the moment. The phrase in the heat of the moment means acting whilst in a state of temporary anger, being so engrossed in the activity and without opportunity to stop and think. It must be shown that the accused did not have time to calm down and calculate his next move before reacting to the provocation. He/she must in that state of anger have lost self-control and temperance. I view the first rung of the provocation test to be subjective. The accused must show that he was provoked into suffering a 'sudden and temporary loss of self-control' because of the deceased's conduct. The loss of self-restraint must render the accused so subject to passion as to make him or her for the moment not master of his/her mind. It follows therefore that where the accused was not provoked even in circumstances where a reasonable person would have been provoked, the matter ends there. He /she would not be entitled to benefit from the defence. Additionally, where the accused had time to cool off and reflect he/she is not allowed to rely on the defence. Therefore, an accused's claim that he was provoked must at all times be assessed against those requirements.

In casu, the accused faces a charge of murder. The law allows him to claim provocation as a partial defence. If successful it will not entitle him to an acquittal but to a reduction of the

capital crime to culpable homicide. The circumstances under which the provocation in this case is alleged to have occurred is common cause. It can be summarised as follows:
The accused is an epileptic patient. The deceased provoked him by taunting him about his illness. He said he could assault the accused until his epileptic condition disappeared. The accused said he lost self-control at that stage and grabbed the deceased with the intention to manhandle him. Walter then restrained him and at the same time ordered the deceased to go away. He complied momentarily but returned with more violence. He was drunk. The accused then added a significant detail which was absent from his defence outline that the deceased picked an empty beer bottle with which he intended to strike him. At that moment the accused said he retrieved a plank which was used as a pivot when opening the car's boot lid. He said he is left handed and with that hand he struck the accused's head once with the plank. The deceased charged at him. The accused raised the plank once more and struck the deceased on the arm. The deceased fled.

It is common cause that the accused is indeed an epileptic patient. While epilepsy is generally considered a disease it is equally viewed as a disability in some societies because it severely inhibits a person afflicted with it from competently doing their day to day activities or remembering things. [1] In other societies, it is stigmatised for no apparent reasons. In my view making reference to someone's medical condition or disability in a negative way as was done by the deceased in this case amounts to an obnoxious comment. I have no doubt that at times statements can leave more indelible emotional bruises than physical scars may do. Taunting such as the deceased employed in this case is a classic form of bullying. It is a non-physical or intangible form of abuse which entails being derisive and contemptuous of another person on the basis of their illness or disability. It is damaging cruelty aimed at harming someone emotionally. It is demeaning and is cowardice of the highest order. The deceased must, in this case have been aware that the illness was the accused's weakest spot. In his drunken and near senseless stupor he aimed for it. It will be setting the bar unnecessarily high to imagine that the accused was not supposed to be provoked by the deceased's conduct. The deceased was being a nuisance. He was demanding money from the accused, a person whom he had no contract with to guard the vehicle. Whilst the accused at first just rebuffed those demands the deceased was not taking it lying down. He aimed low and hit the accused below the belt. Any reasonable

[1] https://epilepsysociety.org.uk/about-epilepsy/wellbeing/living-long-term-condition#:~:text=Epilepsy%20is%20considered%20a%20disability,a%20long%20period%20of%20time. Accessed on 20 October 2023

person placed in the circumstances and position of the accused would have been provoked by such conduct. It is deliberate that the words *'placed in the circumstances and position of the accused'* are used in this defence. They are meant to answer the question who the imaginary reasonable person is. They ensure that the accused such as in this case is not compared with a healthy individual afflicted with no ailment. Instead, the reasonable person must be a person suffering with epilepsy or a kindred health condition like the accused is. If that were not the case, the accused would unfairly be measured against a threshold which doesn't apply to him. When he was provoked the accused went for the deceased, he grabbed him with the intention to manhandle him. He was restrained by Walter who directed the deceased to back off. The deceased, we are told, did so momentarily but soon returned with a vengeance. The question arises whether that hiatus between the utterances deriding the accused by the deceased and the time he backed off allowed the accused to cool off and calculate his next move. It brings to the fore what a cooling off period is. In my view it refers to the time available to the accused to recover, to cool blood after the provocation. It can therefore be considered as the intervening period or phase between the provocation of the accused by the victim and the point when that victim gets killed by the accused. This requirement stems from the rather unsupportable view that provocation is premised on the sudden and temporary loss of self-control. That concept as I see it, only concerns itself with and accords an advantage to those people who are quick to violently react to provocative situations. It forgets that in real life realities, there is always the side of what is called 'slow burn'/ 'slow motion' reactions to violence. [2] Further cooling time like other parts of the defence is measured using the same objective standard. It disregards the different physiological make ups of individuals. Some individuals take longer than others to cool off. Even amongst reasonable people the cooling off periods may not be the same. This is an area that I suggest needs revisiting in our law. I choose to leave it open because it is not decisive in this case and because I did not get full argument on it. What I think is critical to the resolution of the question whether the accused had time to cool off in this case is the related concept of rekindling. **Rekindling** refers to an instance where after the provocative action has ceased and there is a break in between which can ordinarily be viewed as a cooling off period, another provocative event occurs which ordinarily would not be enough to qualify as provocation. The latter occurrence would be intrinsically linked to the earlier one such that it can be said to have been ignited by the earlier conduct which would

[2] https://www.lawteacher.net/free-law-essays/criminal-law/the-law-of-provocation.php Accessed on 20 October 2023

have been undoubtedly, adequate provocation had it not been interrupted by the cooling off time in between.

This case is a classic example of the concepts I discuss above. I have said that at the time he was provoked and profoundly so, the accused reacted angrily and grabbed the deceased. He did not harm him at that time. Rather he released his grip on him. The deceased retreated. We are not told how long it took for him to return. All we have is that his retreat from the scene was momentary. The Oxford Languages Dictionary, 2020 defines the word momentary to mean "lasting for a very short time." Its synonyms are brief, short-lived and quick among others. On the basis of that definition, it means that the time which the deceased went away from the scene was very brief. If it was, it is harsh to view it as sufficient to constitute a cooling off time which would disgorge the accused of the benefit of the defence of provocation. The turnaround was so quick that there was no distinction between the first and the second altercation which led to the fatality. The law accepts that that the shorter the lapse in time between provocation and killing, the more likely it is that the requisite loss of control could be established.

In addition, when the deceased returned he rekindled the provocation. We are told that he returned with more violence and holding a weapon. Although there was debate around that, we have already found that the deceased deeply provoked the accused. He was disorderly and it is possible he returned to the scene as alleged by the accused. That conduct although it would not in itself qualify as provocation is sufficiently linked to the earlier provocation that it rekindled the anger in the accused.

On the basis of the above, we are convinced that the accused was provoked by the deceased into acting as he did. That provocation was so intense as to deprive the accused of the required self-restraint as to render him so subject to passion as to make him for the moment not master of his mind. In addition it is difficult to impute on the accused, the intention to kill or the realisation that his conduct could lead to death. The accused and the deceased were said to be friends. The deceased was behaving badly. He was drunk and was being a nuisance. He provoked the accused as illustrated above. The accused wanted him out of his sight and away from his workplace where he was causing disturbances. He retrieved a plank which was pivoting the car's boot. It was a wooden plank of the dimensions already described. Ordinarily that would not have been a lethal weapon at all if he had not aimed it at the deceased's head. It is our finding therefore that because of the provocation, the accused did not have the requisite intention to ground a conviction of murder.

The accused however acted negligently. The crime of culpable homicide is premised on the understanding that an accused lacked intention to kill but acted negligently. He must have negligently caused the deceased's death. Where the offence is grounded on an assault, the court undertakes a two stage analysis. It must find that the assault was intentional, as it was in this case. The accused admits to intentionally assaulting the deceased. The matter must however proceed to the next stage where the court interrogates the requirement that the accused must have reasonably foreseen that death might result from that assault. Or where the accused realised that death might occur from his conduct, he negligently failed to guard against the possibility of the occurrence of death. The critical aspect therefore is the accused's negligent failure to foresee the possibility of death resulting from the assault.

In the present case, the accused admitted assaulting the deceased. He used a fairly thick and fairly long plank which weighed a quarter of a kilogram. He aimed at the deceased's head. He knew that the deceased was a person who abused alcohol and that it was possible that he was susceptible to all sorts of ailments and other health complications. He must have in this case, reasonably foreseen the possibility that death could occur. He negligently failed to guard against the possibility of the occurrence of death.

When all is said and done, the court's conclusion is that the state adduced insufficient evidence to establish the accused's intention to murder the deceased. As such we are not convinced that the accused's liability for murder has been proven beyond reasonable doubt as required by law. His liability for culpable homicide has however been adequately proved. In the circumstances it is directed that:

1. The accused be and is hereby found not guilty and is acquitted of murder.
2. The accused be and is hereby however found guilty of the competent charge of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, the state's legal practitioners
Mugiya Law Chambers, accused's legal practitioners