STATE
versus
ERINATA MASINA

HIGH OF ZIMBABWE
UCHENA J sitting with Assessors
HARARE 5, 6, 7 October, and 5 November 2010

Criminal Trial

T Mapfuwa, for the State
B Diza, for the accused.

UCHENA J: The accused was charged with, murder in contravention of s 47 of the Criminal Law (Codification and Reform) Act [*Cap 9; 23*]. She pleaded not guilty.

The facts of this case are generally common cause. The accused was the deceased's daughter. She is a woman of advanced age though she said she does not know her age as she cannot, read or write. The deceased was staying with the accused at the farm where the accused worked. The deceased was aged and blind. She therefore needed the accused's assistance as she at times soiled her cloathes. The accused had stayed with her for three years.

On 25 December 2007 the accused's employer threw a Christmas party for his employees. The accused left for the party early in the morning. She left the deceased at home. She had given her food and left her drinking beer. The accused drank a lot of beer at the party resulting in her having to be carried home by Loyce Ruzvidzo and her husband. They left her sleeping in the verandah after Loyce had given the deceased food she had brought from the party. The accused must have been taken to her house before lunch as she says in her confirmed warned and cautioned statement, which was produced by consent, that her drunkenness prevented her from feasting on the sadza which had been prepared for the Christmas party. She slept in the verandah until sunset, when she woke up intending to go to the toilet. As she walked out she stepped on human excrement by the kitchen door. The deceased used the kitchen as her bedroom. The accused went into the kitchen and confronted the deceased, telling her that she must learn to use the toilet. The deceased responded by saying she had done what she did because she ("the accused") had left her alone when she went to the party. The accused took a walking stick the deceased used for walking and

assaulted the deceased on the forehead. As the deceased fell down she struck her again on the head. The deceased fell on bricks which were in the kitchen. The accused then struck her twice on the ribs, and left for the party.

The accused pleaded not guilty raising the defence of drunkenness and provocation. She said she was provoked by stepping on the deceased's excrement and the deceased's remark that she had defecated by the kitchen door because she ("the accused"), had left her ("the deceased") alone when she went to the party. She further said her ability to properly assess the events and react appropriately was impaired by her having been drunk at the time she assaulted the deceased.

The State attempted to dispute the manner in which the assault took place by calling Dr Dhlakama and Jane Chimusanga. Dr Dhlakama's evidence was to the effect that the depression he found on the occipital of the deceased's head could not have been caused by a walking stick, unless it was a heavy one, as the skull bone is hard and can not be easily depressed. He however conceded that the depression could have been caused by the deceased falling on an object, but said that is unlikely, in view of the location of the depression. Under cross examination he agreed that, if the deceased fell headlong on to the bricks which were found with blood, such a fall could have caused the depressed skull.

Jane's evidence was on her finding blood stained bricks, a stone, a glove and metal bars in the kitchen. The fact that these items were blood stained is not in dispute. The accused's explanation is that these things were being kept in the kitchen and got blood stained when the deceased fell headlong on to the bricks. The Doctor and Jane's evidence is circumstantial. All they say is the deceased had a depressed skull, and that the items mentioned above were blood stained. The inference sought to be drawn by the State through Dr Dhlakama is not the only reasonable inference which can be drawn from the facts before the court. The accused's explanation can also be a reasonable inference from the facts. The fact that bricks, stones. metal bars and a glove were blood stained does not mean they were all used to assault the deceased. A glove could never have caused the depression described by Dr Dhlakama. Jane said she found them near the deceased's head, and that the deceased was lying face down. This may be the explanation for the depressed skull, and the, blood stained objects found near the deceased's head. In a criminal trial if the accused's story might be true, she must be given the benefit of the doubt. In the case of *Hardlife Matida* v *State* SC 180/98 at p 3 of the cyclostyled judgment EBRAHIM JA said:

> "There is nothing on the record of evidence to justify a finding that his explanation cannot reasonably be true and he must therefore be given the benefit of the doubt, even though the army driver's version seems more probable"

See also the case of *S* v *Slatter & Ors* 1983 ZLR 144 (HC) at 174.

We therefore accept the accused's version and proceed to determine the case on the common cause facts explained above. We also accept that the accused intended to cause the deceased's death as admitted in her warned and cautioned statement.

Mr.*Mapfuwa* for the State submitted that the accused caused the deceased's death with actual intent. He relied on the accused's confirmed warned and cautioned statement which was produced by consent as exh 1. In the relevant parts of her warned and cautioned statement the accused said:

> "I have understood the above caution. I admit to the allegations being leveled against me because I wanted her to die before my death as she caused problems in my family, I could be hardly happy as I was being assaulted wherever I could go on allegations of possessing goblins to attack other people. On Christmas day, all farm workers were invited to a party organized by farm owner, hence after breakfast I went to the tobacco barns which was the venue, and this was after I had given Esinath some tea, then opaque beer which I had left her drinking. On arrival at the venue we were given opaque beer, after which we were given clear lagers. I quickly succumbed to drunkenness and was escorted to my residence by Dondito and his wife rendering me unable to feast on the party sadza. At almost sunset I woke up particularly sober and surprised that I was at my residence. As I woke up I found that Esinath had relieved herself by the house instead of excreating in a scrapmetal structure for that purpose and this triggered my anger as I went into her room and struck her on the head using her walking stick thereby sustaining a deep cut, and further assaulted her on the left ribs twice, then started out and headed towards the party venue. When I struck her on the head she cried, "Why are you assaulting me", I gave a response and when I made the first strike on the rib cage, she painfully responded this time without a cry, and on the second strike she gave no response. I returned to the party. I drank a little beer, then in the company of Mrs Manhiri and Mrs Mukarakaza we left the venue …
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> … On arriving home I checked on Esinath and felt that she was not breathing, I went to call Mrs Dondita to see what had happened. She came but did not enter the house, instead she called Mrs Manhiri and Mrs Mukarakuza. Mrs Mukarakuza arrived and lit some thatching grass and we all observed a pool of blood which had oozed out from Esinath's head injury and that Esinath had died. Hauring then commenced and people gathered, my husband Gideon Namurera, who was at work was advised by Mrs Dandito. What pained me most was that Esinath was bragging openly on the death of my three brothers, and my four children, and when I went to find the causes of their death she was pin pointed. She was also saying on her death she wanted a pillow, referring to me, so I decided to let her die before myself".

Mr *Mapfuwa* had in cross examining the accused re enforced what the accused said in her statement about having intended to cause deceased's death for the reasons there mentioned. He pointed out that she had woken up sober from her drunken sleep. She noticed the deceased had excreted by the house. She realised she had stepped on human excrement. She went into the kitchen and asked the deceased about it. She then assaulted the deceased with her walking stick on the forehead. She heard her cry asking why she was assaulting her. She saw her fall onto the bricks. When she struck the deceased on the ribs for the first time she noticed that the deceased responded painfully, without crying out. When she struck the deceased on the ribs for the second time she noticed that the deceased did not respond to the pain inflicted by that blow. She then stopped the assault and went back to the party. This is a detailed and revealing analysis of the accused's consciousness at the time she assaulted the deceased. It gives details of the deceased's vocal response to her receiving pain from the initial blows to her lifeless response to the last blow. It according to Mr *Mapfuwa* proves the accused was no longer drunk and knew what she was doing. He referred us to the case of *Sibanda* v *State* SC 9/71 where the Supreme Court held that if the accused is drunk, but knows what he is doing, he should be held accountable for his actions.

We agree with his factual analysis of the accused's conduct, and her appreciation of what she was doing. I also agree with his appreciation of the law as it was before the codification of our criminal law. The accused in her statement said she wanted the deceased to die before her because she ("the deceased"), had said she wanted the accused to be her pillow when she dies. This reveals a conscious decision on her part to cause the deceased's death, hence her assaulting her till she could not respond to the pain inflicted by the last blow.

Mr *Diza* for the accused submitted that the accused should be acquitted because, she acted in a drunken state after being provoked by the deceased. He submitted that she had been provoked by stepping on the deceased's excrement, and the deceased's tugging onto her dress. He submitted that the events leading to the deceased's death were not premeditated, but a result of a drunken reaction to provocation. He referred us to the case of *S* v G*ambanga* 1998 (1) ZLR 364 (SC) at p 366 D-F, where EBRAHIM JA said:

> "A successful plea of diminished responsibility has been said to reduce a charge of murder to culpable homicide: *S* v *Chitiyo* 1987 (1) ZLR 235 (S) at 239B. This statement requires considerable qualification. It has been held in some South African cases that non-pathological criminal incapacity could constitute a complete defence: *S* v *Kensley* 1995 (1) SACR 646 (A) at 658. It has been said that:

> '... an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress ... Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is - what evidence is there to support such a conclusion?' Per DIERMONT AJA (as he then was) in *S* v *van Vuuren* 1983 (1) SA 12 (A) at 17 G-H"

EBRAHIM JA at p 367 C-E further commented as follows;

> "However, I have been unable to find a case where murder was reduced to culpable homicide on the basis of sane criminal incapacity. That it should be able to do so seems to me to be inconsistent with principle.
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> There are numerous cases, though, where a conviction for murder was returned, the accused's state of diminished responsibility being held to reduce the accused's moral, but not his legal responsibility. See, for example, *S* v *Sulpisio supra*; *S* v *Sibiya* 1984 (1) SA 91 (A); *S* v *Phillips & Anor* 1985 (2) SA 727 (N); *S* v T*aanorwa* 1987 (1) ZLR 62 (S); *S* v *Chiwambutsa* 1987 (2) ZLR 59 (S); *S* v *Laubscher supra*; *S* v *Chin'ono* 1990 (1) ZLR 244 (H); *S* v *Calitz* 1990 (1) SACR 119 (A). There is nothing in the facts of the present case to take it out of the ordinary run of cases."

Diminished responsibility due to drunkenness and provocation, according to the none statutory Roman Dutch criminal law, though capable of leading to a reduction of a murder charge to culpable homicide or an acquittal, does not ordinarily lead, to such results, but to his or her being convicted of murder, and the drunkenness and provocation being merely mitigatory. The defence, succeeded in the case of *S* v *Wild* 1990 (1) SACR A 561, referred to in the case of *Gambanga* (*supra*), where the court said "if on the evidence there is a reasonable doubt whether the accused had criminal capacity, he should be given the benefit of the doubt." That must have been the basis of Mr *Diza*'s submission that the accused in this case must be acquitted because she acted in a drunken state, after being provoked by the deceased.

Mr *Diza* further submitted that the weight of the walking stick is not such as can be described as a weapon which can be used by a person intending to cause death. He thus concluded by saying the accused's actions on 25 December 2007 where not accompanied by an intention to cause the deceased's death. He argued that the intention to kill the accused admitted in her warned and cautioned statement was not considered and operationalised at the time the accused attacked the deceased. He submitted that such intention must accompany the *actus reas*, for the accused to be convicted of murder. He referred us to the case of *S* v

Stigling En 'N Ander 1989 (2) SA 720 AD where it was held that intention to kill must be proved beyond reasonable doubt. He thus argued that it had not been proved that the accused realised that death would result from her actions. This submission can not succeed because the accused specifically said she decided that the deceased must die before her own death. She then executed her intention by assaulting the deceased till she could not respond to the blows she was delivering.

Submissions by counsel for the State and defence though well researched and argued did not take into consideration the changes introduced to the defences of intoxication and provocation by *Chapter* (xiv) part (iv) and s 239 of the Criminal Law (Codification and Reform) Act [*Cap 9;23*]. I in view of the provisions of s 3 of the Code brought these to their attention after which I granted them an adjournment to enable them to make additional submissions on the defences referred to above as codified by the Code. Section 3 of the Code provides as follows:

> "(1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.
> (2) Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of -
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> (*a*) the criminal law referred to in subs (1); or
> (*b*) the criminal law that is or was in force in any country other than Zimbabwe."

In his additional submissions Mr *Mapfuwa* for the State, submitted that the accused is guilty of murder as she was no longer intoxicated when she attacked the deceased. He argued that she had the requisite state of mind when she caused the deceased's death. He repeated his earlier analysis of the accused's state of mind. He relied on s 221 of the Code for his submissions. Section 221 provides as follows:

> "(1) If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility
> (*a*) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
> (*b*) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation; such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.

(2) Where a person is charged with a crime requiring proof of negligence, the fact the person was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime shall not be a defence to any such crime, nor shall the court regard it as mitigatory when assessing the sentence to be imposed."

In terms of s 221 (1) (a) the accused should have been intoxicated at the time she committed the act constituting the crime charged. In this case Mr *Mapfuwa* argued that the accused was no longer intoxicated when she attacked the deceased. His reliance on s 221 is therefore erroneous as the section only applies to cases where intoxication still had an effect on the accused. In terms of s 221 (1) (b) if the effect of the intoxication "was not such that he or she lacked the requisite intention, knowledge or realisation; such intoxication shall not be a defence to the crime". This means if it is proved that the intoxication did not prevent the accused from appreciating what she was doing the defence of intoxication will not succeed. The fact that the accused was intoxicated though not to the extent of preventing her from appreciating what she was doing can only be considered as mitigation. Mr *Mapfuwa*'s submission is that the accused was no longer intoxicated. He is therefore saying the defence of intoxication is not available to the accused even to the extent of being merely mitigatory. His submission can therefore not be based on s 221 as that section is intended for an accused who acts with intention while drunk, but not to the extent of not knowing what he is doing

In the event that the accused succeeds in the defences advanced in Mr *Diza*'s further submissions, and as he submitted is convicted of a crime requiring proof of negligence, in terms of s 221 (2) intoxication would not be a defence to such an offence, and can not be considered in mitigation. Mr *Mapfuwa*'s application of s 221 to the facts of this case though erroneous is persuasive when considered from the correct perspective. We do not agree with Mr Mapfuwa's submission, that the accused was completely sober when she assaulted the deceased. We are of the view that the accused though appreciating what she was doing as demonstrated by her detailed narration of how she assaulted the deceased, was still intoxicated but not to the extend of not being able to formulate the requisite intention.. We hesitate to find that she was completely sober because she had just woken up from her drunken sleep. She had been brought home completely drunk, at or just before lunch time. She had slept on the verandah because of her drunken state, and had just woken up. We therefore conclude that she was drunk, but, the effect of the intoxication was not such that she lacked the requisite intention, knowledge or realisation. Therefore in terms of s 221 (1) of the Code, her

intoxication cannot be a defence to the crime, of murder, but can merely be regard as mitigatory when assessing the sentence to be imposed.

In his further submissions Mr *Diza* relied on s 224 of the Code which provides as follows;

> "If a person, while in a state of voluntary intoxication, is provoked into any conduct by something which would not have provoked that person had he or she not been intoxicated, the court shall, in accordance with Part IX, regard such provocation as mitigatory when assessing the sentence."

He submitted that the accused was provoked while drunk, and must therefore be found not guilty of murder but guilty of culpable homicide as provided by s 239 (1) which provides as follows:

> "(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 realisation referred to in section *forty-seven*, the person shall be guilty of culpable homicide if, as a result of the provocation;
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> (*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 realisation 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.
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> (2) For the avoidance of doubt it is declared that if a court finds that a person accused of murder was provoked but that:
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> (*a*) he or she did have the intention or realisation 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 subs (1) but the court may regard the provocation as mitigatory as provided in section *two hundred and thirty-eight*."

Mr *Diza* submitted that the accused was provoked by stepping on the deceased's excrement, and the deceased's tugging on to her dress in circumstances which would not have provoked her if she had not been intoxicated. That far I would agree with his application of the provisions of s 224 of the Code to the facts of this case. He however went on to argue that in terms of s 239 (1) the accused should be found not guilty of murder but guilty of culpable

homicide. He clearly had abandoned his earlier submission based on the dicta in *S* v *Gambanga* (s*upra*) that the accused should be acquitted.

This demonstrates the benefit of reading the Code when dealing with crimes committed after the codification of our criminal law. The provisions of section 224 which Mr *Diza* relied upon, do not envisage the provocation it refers to, to be such as would reduce the crime to culpable homicide because the provocation is such as would not have provoked the accused, had he or she not been intoxicated. It cannot therefore be provocation, which in terms of s 239 (1) would reduce murder to culpable homicide. The provocation envisaged by s 239 (1) is such as would, lead the accused to act without intention or with intention but having completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances to lose his or her self-control. Section 224 of the Code is intended to cover situations mentioned in s 239 (2) of the Code where the accused would act with intention, or the provocation was not sufficient to make a reasonable person in the accused's position and circumstances lose his or her self-control. The provisions of s 224 are not consistent with the provisions of s 239 (1), but are consistent with those of s 239 (2) of the Code. The reference to Part IX in s 224, in the case of murder, can therefore only be referring to s 239 (2) whose provisions like those of s 224 provides that provocation can only be considered as mitigation. In terms s 224 and Part IX of the Code the accused is not entitled to a partial defence in terms of s 239 (1) of the Code. Intoxication in such cases can only be considered as mitigatory.

In fact a close examination of *Chapter* (xiv) part (iv) of the Code reveals that the legislature altered the common law position on voluntary intoxication to the extent that, that defence can never result in the reduction of a murder charge to that of culpable homicide. Section 222 of the Code introduced a new offence of voluntary intoxication leading to unlawful conduct, where the effect of the intoxication leads to the accused lacking the requisite intention, knowledge or realisation required to commit the crime originally charged. Such an accused would still be "liable to the same punishment as if;

(i) he or she had been found guilty of the crime originally charged; and
(ii) intoxication had been assessed as a mitigatory circumstance in his or her case."

This means the new offence of voluntary intoxication leading to unlawful conduct, is not the same as culpable homicide as culpable homicide does not attract the same sentence with murder (the crime originally charged).

In the final analysis Mr *Diza*'s reliance on s 224, and Mr *Mapfuwa*'s erroneous reliance on s 221 (1) which we accepted with a finding that intoxication still had an effect on the accused, leads to the same result. In both cases intoxication is not a defence to the crime of murder but a mitigating factor to be considered in sentencing the accused for murder.

The accused is therefore found guilty of murder in contravention of s 47 (1) (a) of the Code as charged.

Attorney-General's Office, State's legal practitioners
Musunga & Associates, accused's legal practitioners