

THE STATE  
and  
TINOTENDA MANGENJANI

HIGH COURT OF ZIMBABWE  
MUTEVEDZI J  
HARARE, 12 June & 21 November 2023

**Assessors:** Mr *Shenje*  
Mrs *Gwatiringa*

### **Criminal Trial**

*M Furidze* for the state  
*T Mazonde* for the accused

**MUTEVEDZI J:** I am constrained to start from the premises that this is a case which betrays total disinterest in the prosecution of criminal cases by the National Prosecuting Authority. The story we have is that the deceased was murdered in the presence of no less than ten witnesses. Those witnesses included the bar attendant who was selling alcohol to both the accused and the deceased. They included the accused's own brother who is mentioned to have been present from the beginning to the termination of the fight which ended in the murder of the deceased. Many other local people were also present. They could have been easily identifiable if a little effort had been put into it. Out of that multitude, the prosecutor in her wisdom, chose to rely on only three witnesses one of whom is a police officer who came to court to say nothing other than telling us his name. The other two witnesses did not actually see the accused stab the deceased as alleged. At times I stop to wonder if some prosecutors really appreciate the enormity of their responsibilities in assisting the courts in the determination of the guilt or innocence of people accused of crimes. The courts have no business teaching prosecutors how they must deal with their cases. That is particularly so when someone is prosecuting in the High Court. It must however be elementary that a prosecutor must not swallow hook, line and sinker that which the police brings to him/her. Instead, it is the duty of the prosecutor to guide the police in the gathering

of evidence necessary to successfully prosecute the case. In that regard, a prosecutor is permitted to direct the police to record witness statements from individuals whose testimonies do not appear in the docket but are crucial to the resolution of the matter. The hands off approach exhibited by some prosecutors leaves me in no doubt that they either do not read dockets before coming to court or they simply do not care what happens. Yet there are other prosecutors who undoubtedly put their hearts and souls in their work. However where one group strives to do well but another is pulling in the opposite direction the result is a diluted effort. It is disconcerting. The courts' hope is that it is an attitude which the new Prosecutor-General would deal with head on.

Turning to this murder, it depicts the continuing senseless loss of lives. Tinotenda Mangenjani (The accused) is alleged to have killed Nomatter Zvoushe (the deceased) after an argument about a missing pint of beer. The allegations are that on 10 February 2022, at Mhene village, Chief Bushu in Shamva, the accused stabbed the deceased with a knife on the lower left abdomen. He intended to kill the deceased or realised that there was a real risk or possibility that his conduct could lead to death but despite that realisation he persisted with his conduct. The deceased died from the injuries which he sustained from the assault. The background to the assault was that the deceased and the accused were drinking beer at a tuck-shop in the village. The accused could not find his beer. He blamed the deceased for it. A misunderstanding arose which degenerated into the two pushing and shoving each other. Another imbiber called Ngonidzashe Zvoufa tried in vain to restrain the accused from attacking the deceased. The accused later pulled out a knife with which he stabbed the deceased as already indicated. The deceased collapsed. The accused fled from the scene. Good Samaritans took the deceased to the back of the tuck-shop from where one Vimbai Ruvimbo Ngwena heard the deceased's distress cries. She ferried him to the police station where a report of assault was made. The deceased was later taken to Shamva hospital from where he was transferred to Bindura hospital. His condition deteriorated until he died on 11 February 2022. A post mortem examination was carried out on 22 April 2022. The pathologist concluded that death was due to severe abdominal trauma due to stab wound.

The accused denied the allegations. He admitted that on the day in question he was drinking beer with other patrons who included the deceased at a *shebeen* in their village. He and the deceased were neighbours and their family relations were generally good. He had started drinking beer around 1000 hours. When he arrived at the drinking spot the deceased and Ngonidzashe Zvoufa were already there and were drinking. At the time when the

altercation started, the accused said he had bought a pint of beer which he placed on the counter as he spoke to other revellers. When he turned to take a sip from his bottle, it was gone. He asked Ngonidzashe and the deceased as to who had taken his beer. Ngonidzahse indicated that it was the deceased. The deceased denied having taken the accused's beer. A scuffle which escalated into a fight between Ngonidzashe and the deceased ensued. The deceased was apparently enraged by Ngonidzahse's false accusation that he had stolen the accused's beer. The accused said he then intervened to restrain the two from fighting. He pushed Ngonidzashe aside but as he did so, Ngonidzashe pulled a knife from his pocket. The accused further said he warned Ngonidzashe against using the knife. He managed to take it away from him. In the process Ngonidzashe was accidentally bruised on the arm. They wrestled for the knife. As that struggle went on, the deceased came charging towards the accused and Ngonidzashe. He was holding a broken beer bottle. He lifted it towards the accused. The accused realised the danger. He reacted in order to protect both himself and Ngonidzashe by raising his hand with the knife and stabbing the deceased once on the lower part of the body. His intention, so he argued, was to immobilise him. The deceased fell to the ground. The accused further argued that he stabbed the deceased in self-defence and defence of Ngonidzashe. He alleged that the deceased was drunk and capable of inflicting serious injuries on him (the accused) and other people present. He admitted that he was also beginning to get drunk but was still in control of his faculties. He prayed for his acquittal

#### **State case**

The prosecutor commenced her case by seeking the admission of the evidence of Admire Chaka in terms of s 314 of the Criminal procedure and Evidence Act [*Chapter 9:07*] (the Code). The defence did not object. The evidence was duly admitted as it appears in the state's summary of evidence. In summary, Admire Chaka's testimony was that he is a police officer in the ZRP. He saw the deceased's body at Bindura mortuary on 11 February 2022. It had a laceration on the lower left abdomen. There was one suture stitch on the wound. On 14 February 2022, he attended the scene with another police officer. The accused could not be located. He was only arrested days later. He recorded a warned and cautioned statement from him. The accused also made indications at the crime scene. The murder weapon was equally not found. After Chaka's evidence the prosecutor also applied to tender the post mortem report as an exhibit. The defence once again did not object. The report became exhibit 1 in the trial. Next was an application to tender the accused's confirmed, warned and

cautioned statement. It was not objected to and as such it became exhibit 2. The essential part of the accused's statement read that:

"I stabbed him since he intended to attack me. The issue he intended to attack me for was that I had missed my beer which I had bought. Upon asking who had taken my beer, Ngonidzashe Zvoufa said the now deceased is the one who had taken my beer. Ngonidzashe drew out a knife from his pocket and I snatched it from him. I then asked the one who had taken my beer to return it. That is when the deceased now approached me saying that I was accusing him of taking my beer. I then stabbed him with that knife once on the left side of the stomach and he fell down."

I will return to deal with the contents of the statement later in the judgment.

### **Evidence of Ngonidzashe Zvoufa**

He knew both the accused and the deceased as his neighbours. The deceased was also his nephew. On the day in question, he arrived at Mhene tuckshop around 1900 hours. It was raining and he decided to seek shelter at the tuck shop. He then noticed the accused and the deceased involved in an argument. The deceased was encouraging the accused that they should drink their beer like they had been doing all along. He saw accused pulling out a knife. The witness said he approached the two intending to restrain the accused. He was standing about nine metres from them. The place was illuminated by a light bulb. When he approached the two he said he advised the accused to stop what he was doing. The accused instead stabbed him with a knife on the arm. He sustained a scar on the arm. The witness further said he left immediately after he was stabbed to seek help from the tuck shop owner called Mrs Mhene who is a nurse. Whilst at Mrs Mhene's gate he said he heard people shouting that the accused had stabbed the deceased. He went back to the scene after Mrs Mhene came. He noticed that the accused had stabbed the deceased on the stomach. Mrs Mhene had bandaged his injured hand. She however rushed to assist the deceased who had suffered more severe injuries. The accused left the scene still holding his knife. A crowd had gathered. Accused's elder brother attempted to apprehend him. The accused however threatened the brother who then desisted. He left him. When it was suggested under cross examination that he had spent the entire day with the accused the witness denied it and said that he had only met the accused around 1900 hours after coming from a funeral. Some police officers had actually come to the funeral looking for the accused in connection with a separate offence. He said that there were many people, in fact as many as fifteen at the tuckshop at the material time. He said none of those people was prepared to restrain the accused because they knew he was of a violent disposition. He said he had no choice because he had an obligation to assist the deceased who happened to be his nephew. Other people actually

advised him, so he said, that once the accused threatened to stab he would do so. His own brother could not restrain him. The witness denied that he told the accused that the deceased had taken his beer or that he was the owner of the knife. He confirmed that he did not see the accused stabbing the deceased because he had gone to seek help after he had also been stabbed.

### **Vimbai Ruvimbo Ngwena**

She said on the day in question she heard commotion outside her house. She checked and saw men who were carrying the deceased. They brought him into her premises so that she could assist him because she is a nurse. Before she examined him, she asked him what had happened and he indicated he had been stabbed by the accused. He had been stabbed in the abdomen and was bleeding profusely. She applied first aid to the deceased by wrapping her head scarf on the wound after putting cotton wool. She took him to the police to get clearance to take him to the hospital. When that was granted she took the deceased to hospital around 2100 hours. No significant issues came out of the witness' cross examination by counsel for the accused.

### **Obedience Ndlovu**

He is a police officer. He attended the scene two days after the stabbing. He couldn't find the accused. He could not find the murder weapon. He only saw one witness. In short he didn't do anything.

Thereafter the prosecutor advised the court that her witness called Jabulani Sande whose evidence appeared in the state's summary of evidence could not be located. She then applied that the evidence be expunged from the record of proceedings. The defence did not object. The evidence was so expunged. The state then closed its case.

Defence case

### **Tinotenda Mangenjani**

The accused gave evidence in his defence. He was twenty-two years old at the time that the offence occurred. He alleged that his relationship with state witness Ngonidzashe was very cordial at the material time. On the fateful day he had arrived at the drinking place around 1000 hours where he found Ngonidzashe, Jabu and the deceased already drinking. They drank beer together until the evening. Around 2000 hours, he said he bought a beer which he placed on the counter. Events then proceeded in the way that the accused narrated

in his defence outline. The additions were that at the time he wrestled for the knife with Ngoni, he also sustained a cut on the palms. The deceased waved a broken beer bottle intending to stab the accused on the neck. It was at that point that the accused stabbed the deceased. He said after stabbing the deceased he threw down the knife and went home. He confirmed that there were about ten people at the tuck-shop. He also confirmed that it was raining that night. He further advised that when he heard that the police were looking for him at the time the deceased was still in hospital he left the area because he feared that he could be assaulted or killed by members of the community. His hope was that the deceased would get well and he would compensate him for the injuries. When he disappeared from the area he said he was getting updates from his wife. When she advised him that the deceased had died he asked to speak to his mother. The accused said he requested his mother to give one of her cows to the deceased's family and he would compensate her for that. He only surrendered himself to the police after the deceased's burial. At the time that he stabbed the deceased he genuinely believed, so he alleged, that the deceased wanted to stab him. Under cross examination, he admitted having been drinking all day but said he was moderately drunk and in control of his faculties at the material time. He also said although they were drinking together each of his colleagues was buying their own beer. They were not sharing beers but were just at the same drinking place. He further admitted that his own brother was at the scene but that he never attempted to intervene in the fight. Crucially he admitted that he fled the scene after the stabbing ostensibly to avoid being assaulted by the crowd which was there although he noticed that the deceased had been seriously injured. He admitted that he did so despite that no one had actually attempted or threatened to assault him. His own brother was at the scene. When he left no one followed him.

With the accused's evidence, the defence closed its case.

In analysis of the case, the starting point is to indicate the **common cause issues**. They are that:

- a. The accused and the deceased had a misunderstanding resulting from the accused's allegation that the deceased had caused the disappearance of his bottle of beer.
- b. They both had been drinking for many hours
- c. Resulting from the misunderstanding, the accused stabbed the deceased with a knife in the abdomen. He said he was defending himself but the state said he was the assailant

- d. The deceased was assisted to go to hospital by Vimbai Ruvimbo Ngwena
- e. The deceased died some days after the assault
- f. The cause of death was peritonitis, large intestine and spleen laceration and severe abdominal trauma due to stab wound. It was uncontentious.

### **The issue**

The only issue which arises for the court's determination therefore is whether or not the accused stabbed the deceased in an act of self-defence and defence of another person.

The right to life is sacrosanct. It cannot be taken away except in terms of the law. The nature of the right comes with the understanding that in cases where it is subjected to unlawful violation, every person has a corresponding right to protect that right even by means as extreme as killing the aggressor. What is required is that the person defending his/her right to life must not exceed the bounds circumscribed by law.

Section 253 which provides for the defence of person is couched in the following terms:

#### **“253 Requirements for defence of person to be complete defence**

(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if—

- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
- (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and
- (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
- (d) any harm or injury caused by his or her conduct—
  - (i) was caused to the attacker and not to any innocent third party; and
  - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.

(2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

It is clear therefore that the law provides as a complete defence to a charge of murder the excuse that when the murder was committed the accused was defending himself or was defending another person. The basis of the defence is not difficult to see. It stems from the fact that a person who is bent on killing another suspends his/her own right not to be killed.

For him/her to rely on that defence an accused's actions must satisfy the prescriptive requirements indicated in s 253. Below we examine the accused's defence against each of the requirements. We have not lost sight that as was held in *S v Moyo* SC 45/84, the accused has no responsibility of proving the defence. All that is required of him is to provide a foundation of the defence and shift the onus to prosecution to disprove that defence.

**a. The unlawful attack had commenced or was imminent**

We doubt that the accused's defence would pass this first hurdle. In relation to this aspect, what we have is his evidence pitted against the evidence of Ngonidzahse Zvoufa. Because there is the testimony of that single witness the rules which regulate a court's reliance on the evidence of a single witness apply. They were aptly summed up in the case of *S v Mupfumburi* HH-64-15 where this court pointed out that with crimes other than perjury and treason, the court is entitled to convict an accused on the basis of the uncorroborated evidence of a single competent and credible witness. The caution is that a court must always be slow to jump and convict an accused on the strength of the unsupported testimony of one witness. There is insufficiency of evidence because the testimony of the witness is the sole proof that the accused is guilty. Caution is required because there is risk of poor observation, inaccurate recollection of what happened and the possibility of the witness having reconstructed the evidence after the event. The quality of the evidence must supplement for the lack in quantity. The requirement therefore is that the uncorroborated evidence of one witness can only be depended upon in circumstances where it is clear and satisfactory in all material respects. Insignificant discrepancies would not colour the evidence but material imperfections would.

In this case, as indicated already, the only evidence that the accused was the aggressor and not the victim came from Ngonidzashe. His evidence is diametrically divergent to that of the accused. In the first place he said he only arrived at the shops at 1900 hours but the accused said he found him already at the tuck-shop when he arrived at 1000 hours. Ngonidzashe vouched that he had been to a funeral earlier. He even said that there were police officers who had attended at the funeral he had been to looking for the accused in connection with a separate offence. There is absolutely no reason why the witness would have lied about this aspect. It did not serve in any way to incriminate the accused in relation to the crime at the tuck shop. On his part though, the accused wanted the witness to be depicted as having been drinking all day. He portrayed the witness as someone who was



drunk at the time the fight broke out. He wanted the court to view the witness as the aggressor who wanted to attack the deceased before he (the accused) intervened to stop him from doing that. Ngonidzashe said the accused attacked the deceased and he (Ngonidzashe) intervened to save his nephew, the deceased against the better advice and judgment of some neutrals who were present that he was putting himself into grave danger. True to the advice the accused attacked both him and the deceased. Our view is that if the corroboration of Ngonidzashe's evidence that the accused was the aggressor was required it was provided by the actions of the accused himself. He alleged that he inflicted the stab on the deceased in a bid to defend himself. But if it was, he should not have run away after he stabbed the deceased. He was the victim and there would have been no reason why the crowd would have wanted to assault a victim who was defending himself. By his admission, his own brother was amongst those who were in the crowd. He would have come to his aid if indeed the accused had been the victim of the deceased and Ngonidzashe's aggression. In any case, going by the accused's version of events Ngonidzashe was attacking the deceased. There was no reason why he would turn against the accused who had not done him any wrong. The accused went into hiding for days on end until the burial of the deceased. It cannot be true that he was afraid members of the community would assault him. He should have simply gone to the police to seek protection. In any case, the evidence on the ground was that everyone appeared to have been afraid of him. No one except Ngonidzashe could dare approach him at the time he was assaulting the deceased. Ngonidzashe had retreated after being stabbed. After stabbing the deceased, the accused nonchalantly walked away from the scene. Not a single person attempted to follow him or to stop him. A victim of crime who injured another in the course of defending himself does not go into hiding. Instead, he is expected to go to the police. That Ngonidzashe was injured was confirmed by Vimbai Ruvimbo Ngwena. The accused himself equally admitted it. It is on the basis of those findings that we are convinced that the evidence of Ngonidzashe is safe to rely on. It is clear and satisfactory in all material respects relating to this aspect. Once that conclusion is reached, it follows that the court agrees that the accused was the aggressor. The first requirement for the defence of person to succeed is that the accused must have been under an unlawful attack which had commenced or which was imminent. There was no attack on the accused. Instead it was him who was attacking the deceased and Ngonidzashe.

A comparison of the accused's confirmed, warned and cautioned statement with his defence outline further exposes the untruthfulness of his story. In the statement he said

Ngonidzashe drew a knife intending to attack him. He then snatched the knife from him. In his defence outline he portrays Ngonidzashe as having sought to attack the deceased before he intervened on the side of the deceased. It is inexplicable. The two versions are mutually exclusive and irreconcilable and are an indication that the accused's story is a concocted one.

Given the above, it becomes unnecessary to discuss all the other requirements of the defence. Where there was no unlawful attack the defence cannot even begin to apply.

The deceased was stabbed in the abdomen. The injuries he suffered as already described were ghastly. In the end despite the paucity of evidence from eye witnesses, the admissions made by the accused himself in a large measure supplemented the testimony of Ngonidzashe. That convinced us that the state had managed to prove its case beyond reasonable doubt as expected of them to ground a criminal conviction.

**In the premises it is accordingly directed that the accused be and is hereby found guilty of murder as charged.**

*Jiti Law Chambers*, respondent's legal practitioners  
*National Prosecuting Authority*, state's legal practitioners