

THE STATE  
versus  
GUTHRIE CHICHETU

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 12, 13 & 16 January 2023 & 16 February 2023

**Criminal trial**

Assessors: *Mr Mhandu*  
*Mrs Chitsiga*

*B Murevanhema*, for the State  
*Mrs C Damiso*, for the accused

**MUREMBA J:** The accused (30) faces a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The allegations are that on 3 October 2021 and at the Council market in Unit J Seke, Chitungwiza, the accused unlawfully and with intent to kill, stabbed Ernest Makwembere ( (21) with a broken piece of glass on the neck thereby causing injuries from which the said Ernest Makwembere (the deceased ) died.

The accused who does not deny that he stabbed the deceased as alleged pleaded not guilty to the charge of murder. However, he tendered a plea of guilty to culpable homicide. The State did not accept the limited plea. So, the matter proceeded to trial.

The accused person in his defence outline said the following. The incident happened as they were socialising as per their usual routine at the council market at around 8: 30 pm. There was a slight altercation between himself and the deceased. The deceased knocked his beer glass in circumstances which led him to believe that the deceased's actions were deliberate and intended to provoke him. He reacted in anger by picking up a shard from the broken glass and attacking the deceased with it. When he attacked the deceased, he had no intention to cause his death. He had been drinking beer on the day and was drunk. His attack was fuelled by intoxication. If he had been sober, he would not have attacked the deceased.

To prove its case, the State led *viva voce* evidence from Takudzwa Jonathan Kambarami and Bruce Nhundu who were in the company of the deceased on the fateful evening. The two were friends with the deceased. They met in the evening and started to watch soccer and music videos on Bruce Nhundu's cell phone. They were with George Munyaradzi Kwaramba. The accused who was not really their friend later came and joined them. The accused is a person from their neighbourhood and they used to see him around. When he came to join them on the evening in question, he was holding a drinking glass. He greeted them and sat at the far end of the bench with the deceased standing close to him. Bruce Nhundu was seated at the centre of the bench holding the phone. As they were watching a certain video, they became excited and started making noise. The deceased who could not properly see from where he was standing decided to move closer. In the process of moving closer he knocked the accused's drinking glass and it broke. This did not go down well with the accused who stood up intending to assault him. The witnesses said that they stood up and restrained the accused. The deceased was apologetic to the accused. He said he was sorry several times. The accused then sat down and everyone thought that the issue was over and went back to watch the videos. After about 20-30 minutes, the accused just stood up, took the broken glass and walked towards the deceased swiftly and stabbed him once on the left side of the neck. The deceased who was caught unaware only managed to cry out that the accused had hurt him. He bled profusely. Upon realising that the deceased had been hurt badly on the neck, the deceased's friends and the accused tried to stop the bleeding and rushed him to hospital where he passed on after about an hour of having been stabbed. The post mortem report that was produced by the State states that the cause of death was hypovolemic shock and penetrating wound to the neck.

The two State witnesses made it categorically clear that there was never an altercation between the deceased and the accused. They said that right from the start the deceased apologised and never argued with the accused. They also made it clear that the deceased's actions were never deliberate when he knocked the accused's glass which was between the accused's legs. Both State witnesses maintained that judging by the accused's actions, he had the intention to kill the deceased. They said this because after having been restrained he sat down. It was only after 20-30 minutes when everybody thought that the issue was over that he stood up, picked up the bigger shard of glass, walked towards the deceased and stabbed him on the neck and threw the shard of glass on the ground. They said that the accused drinks beer, but on this day, he was not drunk. They did not see him drinking any beer from the time that he joined them. They said that when he is drunk, he staggers, but on this day, he was not

staggering. His eyes were not even blood shot as they normally are when he is drunk. However, Bruce Nhundu said that he had only learnt later after the deceased had been stabbed that the accused had spent the day at a party drinking beer and that the glass that was broken by the deceased had been brought by the accused from that party.

Takudzwa Kambarami said that the accused could have been angered by the fact that the deceased had knocked and broke his glass. The witness however said that as soon as the deceased cried out that he had been hurt, the accused tried to render assistance. He used his jersey / sweater to try and stop the bleeding. It appeared to him that the accused was now regretting what he had done. Bruce Nhundu said that the accused had joined them around 6- 7 pm. He sat with them for about 2 hours before he stabbed the deceased. The witness said that after stabbing the deceased, the accused was reassuring the deceased that he was not going to die as he was trying to stop the bleeding with his t – shirt. He even said that the accused was crying.

When the accused then gave his evidence during the defence case, he did not persist with the averment that there was a slight altercation between him and the deceased. He also abandoned the averment that the deceased had deliberately knocked his beer glass in a bid to provoke him. He instead said that when the deceased knocked his glass it was by mistake. The accused explained that he only failed to control himself because he was drunk on the day in question. He said that he had spent the whole day drinking all sorts of beers at a party. He said that since he was not employed, he would take anything that was offered to him from 2 keys, viceroy, etc. The accused said that he also smokes dagga and has been doing so since 2008 which was the same time that he started drinking beer. He said that he smokes dagga every day. He smokes several joints with a group of friends throughout the day and, as such, it is difficult for him to say how much dagga he smokes in a day. He said that on the fateful day he started smoking dagga from the time that he woke up which was between 4:30 am and 5am. He said that he started drinking beer as early as 8am on the day. He said that because of drunkenness he was provoked by the knocking of the glass. The accused said that he had no reason for wanting to kill the deceased.

The accused said that it was true that he had tried to assault the deceased before he stabbed him and was restrained by the State witnesses. He also admitted that he had sat back on the bench for about 20-30 minutes before he stood up again, grabbed the broken glass and swiftly moved towards the deceased and stabbed him on the neck. He admitted that when he stabbed the deceased, the deceased was not facing him. The deceased was not even aware that

he was about to be stabbed. The accused explained that when he stabbed the deceased, he did not intend to stab him as such, but he simply wanted to threaten him. He said that when he realised that he had stabbed the deceased, he was shocked and frightened by the amount of blood that was gushing out. He said that he quickly removed his t-shirt and tried to stop the bleeding with it. He went with the deceased to hospital and was actually arrested at the hospital.

What came out of the evidence that was led from both the State witnesses and the accused is that the accused and the deceased were not enemies. Other than the fact that the deceased knocked and broke the accused's drinking glass on the fateful day, there had been no prior incident between the parties. The manner and circumstances in which the accused stabbed the deceased is not disputed. The issue that needs to be resolved is whether or not the accused had the intention to kill the deceased when he stabbed him.

*Submissions by counsels*

In his closing submissions Mr *Murevanhema* for the State submitted the following. The accused had the intention to kill the deceased because he used a dangerous weapon to stab the deceased on the neck. The accused used massive force in stabbing the deceased. The accused laid no foundation for his drunkenness in his defence outline and even if it is taken that he was drunk, intoxication is not a defence to the charge of murder. Mr *Murevanhema* further submitted that provocation as a defence does not suffice in this case because when the accused initially tried to assault the deceased, he was restrained and he sat down. It was only after about 20-30 minutes that he stood up again and stabbed the deceased. He did this at a time when everybody was thinking that the issue was over. Mr *Murevanhema* submitted that the accused had failed to prove his defences of provocation and intoxication. He failed to prove that he was provoked and intoxicated to the extent of failing to appreciate the consequences of his actions. Mr *Murevanhema* submitted that the State managed to prove that when the accused advanced towards the deceased armed with a broken glass and stabbed him on the neck, he appreciated or foresaw the possibility of injuring the deceased, but nevertheless proceeded with his actions. He submitted that the State had managed to prove murder in terms of s 47 (1) (b) of the Criminal Law Code. He however, did not say why the accused should not be convicted of murder in terms of s 47 (1) (a). Mr *Murevanhema* submitted that the accused cannot talk about having been negligent when he aimed at the deceased's neck using a broken glass with sharp edges. He submitted that if the accused wanted to threaten the deceased as he said, he would have

aimed at some other part of the body which is less dangerous than the neck. With regards to the defence of provocation, Mr *Murevanhema* submitted that the reasonable man would not have acted in the manner the accused acted.

In her closing submissions Mrs *Damiso* submitted the following. The accused did not proffer the defence of provocation because the kicking of a glass would not be sufficient for this defence. She further submitted that the accused had also not proffered the defence of intoxication although intoxication is a feature in the case. Mrs *Damiso* further submitted that the accused's testimony was that although his actions were fuelled by intoxication, he still was in sufficient control of his mind and he knew that he did not intend to kill the deceased. She further submitted that the fact that the accused had a good recollection of the events of the fateful day does not mean that when he stabbed the deceased, he had the intention to kill him.

Mrs *Damiso* took issue with the way the charge against the accused was couched. She submitted that although the State charged the accused with murder as defined in s 47 (1) of the Criminal Law Code without indicating whether it is in terms of ss (1) (a) or ss (1) (b), it was clear from the wording of the charge that the State was charging the accused under s 47 (1) (a) because it said that the accused "*with intent to kill, stabbed Ernest Makwembere ...*" She submitted that the State failed to prove that the accused had the intention to kill the deceased because there was no proof of animosity between the accused and the deceased. Instead the accused and the deceased used to socialise together. The accused could therefore not have had the intention to kill the deceased. She further submitted that the accused's conduct after stabbing the deceased is indicative of lack of intention to kill. He cried and tried to help the deceased in a bid to save his life. She submitted that the State led no evidence to show that the accused used massive force when he stabbed the deceased. No evidence was led to prove that the accused specifically aimed at the neck of the deceased.

Mrs *Damiso* further submitted that even if the State had amended its charge and had charged the accused in terms of s 47 (1) (b), still the State did not manage to prove the guilt of the accused beyond reasonable doubt under this provision. In terms of s 15 (1) (a) of the Criminal Law Code, the State failed to prove that the accused was aware that there was a risk or possibility that his conduct might lead to the death of the deceased. She prayed that the accused be acquitted of the charge of murder. She said that what happened to the deceased was unfortunate, but the accused had no intention to kill him. She submitted that the accused should be convicted of culpable homicide on the basis that he ought to have known that his actions might lead to the death of the deceased.

In reply Mr *Murevanhema* submitted that the defence counsel had not explained where negligence arose in the present case so as to warrant a conviction of culpable homicide. He said that she did not explain that which the accused did which a reasonable man would not have done or that which the accused did not do which a reasonable man would have done.

*Analysis and application of the law*

When Mrs *Damiso* gave her closing submissions, she gave the impression that when the State is charging an accused with murder, it ought to be specific whether it is doing so in terms of s 47 (1) (a) or in terms of s 47 (1) (b) of the Criminal Law Code. She said that in *casu* although the State was not specific, the language used in the charge shows that the accused was being charged under s 47 (1) (a). She then submitted that the State had failed to prove the case of murder under s 47 (1) (a). Mrs *Damiso* went on to say:

“Even if we assume that the State would have amended their charge and preferred a murder charge in terms of s 47 (1) (b), still the State has not established the guilt of the accused beyond reasonable doubt.”

This submission gives the impression that if the State charges an accused in terms of s 47 (1) (a) and it then realises that it has no evidence to secure a conviction, it ought to amend the charge so that the accused is charged in terms of s 47 (1) (b). She however, did not say at what stage of the trial the State should seek to make that amendment. Be that as it may, on the basis of her submissions we feel obliged to discuss the charge of murder as it is provided for under s 47 (1) of the Criminal Law Code. It reads;

47 (1) Any person who causes the death of another person—  
(a) intending to kill the other person; or  
(b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility;  
shall be guilty of murder.

The provision means that for an accused to be convicted of murder, the State must prove that either the accused intended to kill the deceased as defined in s 47 (1) (a) or he or she realised that there was a real risk or possibility that his or her conduct may cause death, but continued to engage in that conduct despite the risk or possibility as defined in s 47 (1)(b). In terms of s 47 (1) (a), the accused deliberately causes the death of the deceased. The accused desires the criminal consequence and strives to bring it. In short, the accused has the actual intention to cause death. In terms of s 47 (1) (b), the accused does not mean to bring about death but is aware that there is a real risk or possibility that death may result as a result of his

or her conduct, but nonetheless persists with his or her conduct. He is reckless as to whether or not death will result. The offence is not normally planned but is normally committed in the spur of the moment. Professor G Feltoe in the Commentary on the Criminal Law (codification and Reform ) Act [Chapter 9:23] 2nd Edition , 2012 at p 51 succinctly distinguishes the two by saying that under s 47 (1) (a) the accused is guilty on the basis of actual intention whereas under s 47 (1) (b) the accused is guilty on the basis of what used to be referred to as legal intention before the criminal law was codified. However, what is considered in both instances is the personal state of mind of the accused at the time of the alleged commission of the crime. The test in both instances is a subjective one. G Feltoe in *A Guide to the Criminal Law in Zimbabwe*, 3<sup>rd</sup> Edition, 2004 at P 10 says;

“His personal mental makeup and personality must therefore be considered together with any other factors, such as intoxication, which may have influenced his ability to form the requisite intention at the relevant time. The issue therefore is what was accused’s state of mind at the time, not what would have been the state of mind of a reasonable man placed in that situation”.

Having made the distinction between s 47 (1) (a) and s 47 (1) (b), we need to point out that the charge of murder does not change whether it is preferred in terms of s 47 (1) (a) or s 47 (1) (b). Murder is murder. The difference between s 47 (1) (a) and s 47 (1) (b) lies in the degrees of murder. A murder that is committed intentionally in terms of s 47 (1) (a) is a more serious form of murder than a murder that is committed recklessly in terms of s 47 (1) (b). Murders that are committed in terms of s 47 (1) (a) often have some of the strongest punishments such as death, imprisonment for life or any definite period of not less than 20 years. Murders that are committed in terms of s 47 (1) (b) are a step down in severity when compared to the murders that are committed in terms of s 47 (1) (a). Put differently, the main differences between the two subsections are the severity of the crime itself and the severity of the punishment received. This distinction in the degrees of murder has no effect on the conviction or verdict. For the purpose of the conviction or verdict, it does not really matter whether the accused is convicted under s 47 (1) (a) or under s 47 (1) (b). The impact of the distinction is felt or seen in the sentence or punishment that is then meted out on the accused.

In view of the foregoing discussion, we do not believe that it is necessary for the State to indicate in the charge that it is charging the accused with murder as defined in terms of s 47 (1) (a) or s 47 (1) (b). It is sufficient for the State to simply state that it is charging the accused with murder as defined in s 47 (1) of the Criminal Law Code just like it did in the present case and then incorporate the mental ingredients of the offence in terms of s 47 (1) (a) and s 47 (1) (b). The only error that the State made in *casu* was to simply say in the charge “*Guthrie Chichetu unlawfully and with intent to kill stabbed Ernest Makwembere ...*” This only incorporates the mental ingredient of the offence under s 47 (1) (a) and leaves out the mental ingredient under s 47 (1) (b). The State ought to have incorporated the mental ingredient under s 47(1) (b) by saying;

“Guthrie Chichetu unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct may cause death .....

We are of this view because whether or not the accused will be convicted in terms of s 47 (1) (a) or in terms of s 47 (1) (b) is a question of evidence. This is proven through the evidence that the State will adduce. It is in the closing submissions that the State should, on the basis of evidence adduced, make submissions on whether the accused should be convicted of murder in terms of s 47 (1) (a) or in terms of s 47 (1) (b). The court will then make a determination on whether the accused is guilty of murder in terms of s 47(1) (a) or s 47 (1) (b).

We however do not believe that in the present case the omission by the State to include the mental ingredient under s 47 (1)(b) in the wording of the charge is fatal. This is because the accused suffered no prejudice as a result of the omission. The omission did not prejudice him in giving his defence(s) that relate(s) to his mental state at the time that he stabbed the deceased. The defences that relate to the accused’s mental state do not change whether the accused is charged with murder under s 47 (1) (a) or s 47 (1) (b). If the evidence that was led by the State in *casu* does not prove murder committed with actual intent but as a result of recklessness, the accused will be convicted of murder in terms of s 47 (1) (b). There was therefore no need for the State to make any amendments to the charge as Mrs *Damiso* submitted.

The physical ingredient of murder which is that the accused unlawfully caused the death of the deceased is not disputed. The issue that we need to resolve is whether the accused is guilty of murder as the State submitted or culpable homicide as the defence submitted. Whilst the accused stated in his defence outline that he believed that the deceased had kicked his glass

in order to provoke him and that he reacted in anger because of intoxication, Mrs *Damiso* however, in her closing submissions submitted that the accused had not proffered provocation or intoxication as his defences because these would not be sufficient as defences to the charge of murder the accused is facing. We found Mrs *Damiso*'s submission confusing because the defence outline gave the impression that the accused was relying on provocation and intoxication as his defences. However, we do agree with Mrs *Damiso* that these two defences are not sufficient and cannot succeed in the circumstances of this case. When the accused took the witness stand during the defence case, he said in his own words that when the deceased knocked and broke his glass, it was clear to him that the deceased had not acted deliberately. It was a genuine mistake. Under such circumstances the issue of provocation would not even arise. There is no provocation to talk about. However, the accused said that the drunken state he was in might have caused him to feel provoked by his glass being broken. He further said that had it not been for the intoxication, he would not have committed the offence. In terms of s 221 of the Criminal Law Code, voluntary intoxication cannot be a defence to a charge requiring proof of intention, knowledge or the realization of a real risk or possibility if the effect of the intoxication was **not** such that the accused lacked the requisite intention, knowledge or realisation. Put differently, if the accused despite being intoxicated formed the intention, had the knowledge or realised the risk or possibility of his or her actions, he or she will be found guilty of the crime. According to professor G Feltoe in the Commentary on the Criminal Law (Codification and Reform) Act, 2<sup>nd</sup> Ed, 2012[*Chapter 9:23*] at p 205;

“If despite the intoxication, the accused was still able to form and did form the requisite subjective state of mind, he or she will be found guilty of that crime, but the court may regard his or her intoxication as mitigatory.”

What s 221 means is that voluntary intoxication is a defence to a charge requiring proof of intention, knowledge or the realization of a real risk or possibility if at the time of the commission of the crime, the effect of the intoxication on the accused was such that he or she did not form the intention, have knowledge or realize the existence of the risk or possibility required in committing the crime. In *casu* we noted that starting from the defence outline and throughout the trial, it was never said that the accused was intoxicated to the extent of failing to form the intention to kill or to realise that there was a real risk or possibility that his conduct may cause the death of the deceased. That averment was never made. It was only said that if

the accused had not been drunk, he would not have committed the offence. We do not believe that saying that if the accused had not been intoxicated, he would not have committed the offence is enough. It is not synonymous with saying that the accused was intoxicated to the extent of failing to form the required intention to kill or to realise that there was a real risk or possibility that his conduct may cause death. In any case the accused said that although he was drunk, he was aware of his intention when he approached the deceased. He said that he never intended to kill the deceased, but only to threaten him. We also observed during trial that the accused had a very good and vivid recollection of the events of the fateful evening step by step, despite him saying that he was drunk. Whilst a good recollection of events does not mean that accused had the intention to kill the deceased, it however shows that he knew and was in control of what he was doing when he stabbed the deceased. So, whilst the accused could have been intoxicated at the time of the commission of the crime, nothing shows that the effect of the intoxication on him was such that he did not form the intention to kill, or that he failed to realize the existence of the risk or possibility that death could result from his conduct. It is on this basis that we agree with Mrs *Damiso* that the defence of intoxication cannot succeed in the circumstances of the present case.

After Mrs *Damiso* submitted that the defences of provocation and intoxication would not succeed in the circumstances of the present case, we were at a loss as to what then she was saying the defence of the accused was. She did not make that clear. She mainly concentrated on submitting that the State had not managed to prove the offence of murder either in terms of s 47 (1) (a) or s 47 (1) (b), her argument being that the accused had not intended to cause the death of the deceased on the basis of two reasons. Firstly, he had no motive for wanting to kill the deceased as the two were enjoying good relations prior to the fateful day. Secondly, the accused tried to render assistance to the deceased soon after stabbing him. It is on this basis that Mrs *Damiso* submitted that the accused should be convicted of culpable homicide. She even submitted that the State had not led any evidence to prove that the accused had aimed at the neck of the deceased and had used massive force when he stabbed the deceased. The submission was that the accused ought to have known that attacking the deceased with a broken glass on the upper part of the body might lead to death.

Unfortunately, we are not able to agree with Mrs *Damiso* for the following reasons. To begin with, the intention of an accused person is not determined solely on the basis of his motive and his conduct towards the victim or the deceased after committing the offence. Motive and intention are two different and distinguishable concepts. See G Felton *A Guide to Criminal*

*Law in Zimbabwe*, 3<sup>rd</sup> Ed, 2004 at p 11. Motive is the reason why the accused acted or what motivated the accused to act in a certain manner whereas intention is the mental objective behind the actions of the accused. Intention is what the accused expects or foresees. Motive is irrelevant to criminal liability, but it can help in showing what the accused desired or intended. In other words, what motivated the accused can be indicative of his or her intentions. G Feltoe in *A Guide to the Criminal Law in Zimbabwe*, Legal Resources Foundation 3<sup>rd</sup> Edition, 2004 at p 11 says proof of bad motive often assists in establishing the guilt of the accused. There can be no direct evidence of intention unless the accused admits to having had the required intention. Intention is therefore inferred from the circumstances of the case and all other available evidence to determine what is it that the accused 'must have' been thinking at the time he or she committed the offence.

*In casu* whilst it is not disputed that the accused and the deceased had no bad blood prior, the evidence led by both the State and the defence shows that the accused was angered by the knocking of his glass by the deceased. This is the reason why he wanted to assault the deceased initially. Bruce Nhundu said that they had a mammoth task trying to restrain the accused until he calmed down. The evidence further shows that this is the same reason why he stabbed the deceased about 20-30 minutes later. To the accused the issue was all about his drinking glass that had been knocked and broken by the deceased. Mrs *Damiso* was therefore not correct when she submitted that there was no motive for the accused for wanting to kill the deceased. The motive arose instantly when the deceased knocked and broke the accused's glass. As to whether this motive was sufficient ground for stabbing the deceased or not is another issue.

The next issue is whether the accused's actions of trying to help the deceased are indicative of the accused's lack of intention to cause the death of the deceased. In other words, can the accused's lack of intention be inferred from his actions /conduct after stabbing the deceased? As we have already said elsewhere above, intention is inferred from the circumstances of the case. The circumstances must be taken cumulatively or holistically. In *casu* the accused inflicted serious injuries on the neck which is a vulnerable part of the body using a broken glass which had sharp edges. The post mortem report shows that the accused cut the deceased's jugular vein. By cutting the jugular vein the accused must obviously have used massive force when he stabbed the deceased. The inevitable inference from these circumstances is that the accused must have intended to bring about the death of the deceased or he at least realised that there was a real risk or possibility that his conduct might cause death

but persisted with it despite the risk or possibility. Surprisingly, when the deceased cried out after being stabbed, the accused became frantic trying to render help to the deceased. He removed his sweater and t-shirt as he tried to stop the bleeding. He was even crying and telling the deceased that he was not going to die. He was also involved in ferrying the deceased to hospital. In other words, the accused tried to help the deceased after the fact, when he had already caused severe injury. Obviously, the accused's actions were weird and contradictory to what he had just done to the deceased. However, in his own words he said that he helped the deceased because he was shocked by the amount of blood that he saw gushing out after he had stabbed him. The accused's actions were therefore as a result of the full realization of the consequences of his actions. This had nothing to do with him having lacked intention or failed to realise the risk or possibility of his conduct when he stabbed the deceased. The State witnesses said blood was gushing out like water gushing out of a hose pipe and it was a horrific sight to perceive. Bruce Nhundu said that when the deceased was stabbed, he ran to him and asked him to torch him on his neck in order to see where exactly he had been stabbed. Bruce Nhundu said when he saw the wound and blood gushing out, he was extremely frightened, and he ran away for a while before going back to the deceased to render help. That was the same time the accused saw the wound that he had inflicted and the blood that was gushing out. The accused also got frightened and started to render help. The circumstances taken cumulatively show that the accused rendered help simply because he was now scared of what he was seeing. He was now seeing the magnitude of what he had done and the actual consequences thereof. They were ghastly even to himself. In his own words he further said that when he saw blood gushing out, he sobered up. So, the rendering of help to the deceased in the circumstances of the present case cannot not be taken to mean that the accused had had no intention to kill the deceased or that he failed to realise the risk or possibility of his conduct when he stabbed the deceased.

In view of the foregoing, it is our conclusion therefore that when the accused stabbed the deceased, there was a motive. It is also our conclusion that when the accused rendered help to the deceased after stabbing him, he did so out of the full realisation of the consequences of what he had just done. He was horrified by what he was now seeing. The rendering of help had nothing to do with what he had intended at the time that he stabbed the deceased. On this basis we therefore dismiss Mrs *Damiso's* submission that the State failed to prove the offence of murder because it did not prove that the accused had a motive for wanting to kill the deceased and further, it had been shown that the accused had rendered help to the

deceased after stabbing him. There is therefore no basis for the accused to be convicted of culpable homicide. In terms of s 49 of the Criminal Law Code, the offence of culpable homicide is committed when the accused causes the death of another person by either negligently failing to realize that death may result from his or her conduct or when the accused realizes that death may result from his or her conduct but negligently fails to guard against that possibility. The offence has an element of negligence which involves carelessness but not recklessness. For instance, the accused only kills with an intent to cause serious bodily harm to the victim. Here the objective test is applied. The issue is not what the accused intended or subjectively foresaw or realised at the time of the commission of the crime. The issue is whether the reasonable man placed in the same circumstances as the accused would have foreseen the murder or realised that death may result from his conduct and would have guarded against it. The issue is about that which the reasonable man would have done which the accused did not do or that which the accused did which the reasonable man would not have done in the circumstances. The problem in the present case is that other than saying that the accused had not intended to cause the death of the deceased on the basis that he had no motive to do so and that he tried to render assistance to the deceased soon after stabbing him, Mrs *Damiso* did not analyse the actual assault that the accused perpetrated on the deceased in order to show lack of intention or failure to realise the existence of a risk or possibility that death could result from his conduct. We do not see how from the circumstances of the assault itself the accused can be said to have been negligent. It is also not clear as to what he did not do which the reasonable man would have done or vice versa.

Speaking for himself and in explaining his actions during the defence case, the accused said that he had only intended to threaten the deceased when he stabbed him. Unfortunately, that explanation is illogical in view of the fact that the accused stabbed the deceased with a broken glass on the neck. A broken glass is a dangerous weapon. The neck is a vulnerable part of a person. The accused even used massive force in stabbing the deceased because he cut the jugular vein which is a major blood vessel that takes blood from the head back to the heart. The deceased lost so much blood that he died within one hour of having been stabbed. The post mortem report says that the wound that was inflicted was 8cm long and it was at the base of the neck. The question is how does a person threaten another person by doing all of this? If the accused had intended to threaten the deceased, he would not have done what we have described here. The accused went beyond threatening the deceased. It is our considered view that the accused in the circumstances of this case stabbed the deceased with the intention to kill

him. He did not stab the deceased in the heat of the moment. When he attempted to assault the deceased for the first time he was restrained. He had time to calm down. He sat down for about 20-30 minutes before he stood up, picked up the broken glass and swiftly walked towards the deceased and stabbed him on the neck. When the court asked him what he was thinking in those 20-30 minutes when he was seated, he said that he did not know what he was thinking. For a person who had a vivid recollection of everything that happened that evening, he chose not to tell the truth. He knew what he was thinking. It is our considered view that it was in those 20-30 minutes that he was planning to kill the deceased. He decided to attack him when everyone thought that the issue was over and least expected that he would attack. He attacked when everyone was concentrating on watching the videos. He did this because he did not want to be restrained and for sure no one had the opportunity to restrain him. The deceased was looking aside not even aware that the accused was advancing towards him. This was a premeditated murder which was committed with actual intent.

In view of the foregoing the accused is found guilty of murder as defined in s 47 (1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

#### SENTENCE

In assessing the appropriate sentence we have taken into account that the accused was 28 years old when he committed the offence. He is now 31 years old. He is a first offender and he was intoxicated on the day that he committed the offence. During the whole trial the accused expressed great remorse. In his own words he said that with what he did he does not think that he deserves to be alive. He even said that with what he did he is prepared to accept any form of punishment that the court will impose on him. The accused is a person who appreciates that he did wrong. The way he expressed contrition showed that he cannot really believe that he actually killed a person. He said all of this when he gave his evidence in chief. After his lawyer had finished leading him, she asked him if he had anything else to say. He said that from the time this offence happened he never got the chance to meet with the deceased's relatives and apologise to them. He looked in the gallery, faced them, put his hands together and asked them to find it in their hearts to forgive him for killing their child. It was a very touching moment even for the court. There was total silence for a while. It was submitted that the accused's older brother attended the deceased's funeral. The accused's family is in the process of engaging with the deceased's family over what happened. It was submitted that both families were still waiting for the outcome of this case. It is mitigatory that it is not only the accused who realises

the wrong that he did, his whole family realises it too. Hopefully the deceased's family will find it in their hearts to forgive the accused.

On the other hand what aggravates the offence is that the accused intentionally killed the deceased who was only 21 years old. He was still a very young man. He was killed over a very petty issue. His crime was to knock and break the accused's drinking glass by mistake as he was walking in a bid to get closer to the phone in order to watch a video. Just for making that mistake the accused used a shard of the broken glass to stab him on the base of the neck thereby inflicting an 8 cm long wound. The accused cut the jugular vein of the deceased. From the description given by the State witnesses, blood gushed out like water gushing out of a hosepipe. Everyone was horrified, including the accused. The accused removed his sweater and t- shirt as he made frantic efforts to stop the bleeding. They rushed the deceased to hospital but he died with one hour of having been stabbed. The accused killed the deceased in cold blood just like that.

The accused said that he appreciated that the deceased had knocked his glass by mistake. He went on to say that had he not been drunk he would not have committed the offence. When I asked him why then he killed the deceased he said that this is how people get used by intoxicating substances. He explained that because of unemployment all he has been doing since 2008 is to drink beer and smoke dagga on a daily basis, He starts smoking dagga as early as 4.30am – 5am every day and he spends the whole day doing so with friends. He said that he cannot even tell how much dagga he smokes in a day because they, smoke as a group passing joints. This shows that drug abuse has reached alarming levels in our society. The present case demonstrates that drug abuse precipitates violent behaviour. What the accused said shows that intoxication leads to misperception. A genuine mistake by the next person, like the knocking of a glass by the deceased, may be perceived as an act of hostility. How the accused reacted also shows that intoxicating substance interrupt cognitive processing; making it difficult to control anger and to make good decisions. An intoxicated person can even ignore future consequences and focus on the here and now thereby making them more aggressive. This is what happened to the accused in the present case. In his moment of anger over the broken glass the accused decided to kill the deceased and he ignored the future consequences thereof. However, as soon as the deceased cried out after being stabbed, the accused in his own word's said that he sobered up. He was telling the truth because there was evidence that he was now crying, removing his sweater and t – shirt as he tried to save the deceased's life. He was now telling the deceased that he was not going to die. He was amongst the people who ferried

the deceased to hospital. He even said that the people at hospital did not quickly attend to the deceased. He really wanted the deceased to survive. He was now at the forefront of trying to save the deceased's life. Unfortunately the deceased failed to make it.

Stiffer penalties are called for against people who voluntarily take intoxicating substances and end up engaging in violent behaviour causing unnecessary loss of lives like what happened in the present case. There is need to deter offenders and other would be offenders from engaging in such conduct. On the basis of the foregoing, it is our considered view that a sentence of 10 years' imprisonment with half of it suspended on condition of future good behaviour as suggested by Mrs *Damiso* will put to shame the justice delivery system. It will be like the justice delivery system is encouraging society to take intoxicating substances and go about butchering other people. On the other hand a sentence of 45 years imprisonment as suggested by Mr *Murevanhema* will be too harsh considering the mitigatory factors discussed above. A sentence which reflects a balance of mitigatory and aggravatory factors is called for. In our view a sentence of 30 years' imprisonment will meet the justice of the case. This is in view of the fact that accused committed this offence when he was 28 years old. He is now 31 years old. He is still fairly youthful. With the way he expressed remorse throughout the proceedings, he deserves another chance. Hopefully he will come out of prison a rehabilitated person. We believe that the sentence will also make the deceased's family and the society at large feel that justice was done in the matter. We bear in mind though that not even the most severe form of punishment can bring the deceased back to life. Once life is lost, it is lost forever.

In view of the foregoing, the accused is sentenced to 30 years' imprisonment.

*National Prosecuting Authority*, State's legal representative.

Advocate *C Damiso- Advocates Chambers*, accused's *pro deo* legal representative