

THE STATE  
versus  
JOSEPH JEKISENI

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 18, 19 & 30 May 2023 & I June 2023

**Criminal Trial**

Assessors: Mr *Mpofu*  
Mrs *Chitsiga*

*A Masamha*, for the State  
*B Chidziva*, for the accused

MUREMBA J: The accused pleaded not guilty to the charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).

The State alleges that on 27 February 2022 the accused unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct may cause death continued to engage in that conduct despite the risk or possibility, shot Douglas Chiripai once thereby causing an injury from which the said Douglas Chiripai died.

The State alleges that the accused who is employed as a security guard by Fawcett Security Company was at Forbes 38 Mine, Village Mandimu, Chief Bushu, Shamva when he observed some intruders at the mine around 0200 hours. He suspected that they were stealing gold ore. He fired a warning shot and the motor vehicle sped off. The accused then heard some movements and proceeded towards where he had heard the movements. He saw two people hiding behind a shrub. He fired a shot towards them thereby killing the deceased.

In denying the charge the accused stated in his defence outline that he did not intentionally cause the death of the deceased. He also denied negligently causing the death of the deceased. The accused said that as he was manning the gold mine alone on the fateful night around 2 am, the deceased in the company of several other gold panners invaded the mine with the intention of panning for gold and stealing gold ore. They were armed with machetes and other dangerous weapons. They stole 9 x 50kgs of gold ore. When the accused saw them, he

fired a warning shot, but instead of relenting these people advanced towards him threatening to kill him. These people had hired a motor vehicle to ferry the gold ore. On realising that the gold ore was being taken away, the accused fired another warning shot and the motor vehicle sped away. Assuming that the intruders had fled, the accused walked to where the loot had been left. The intruders suddenly emerged from the bush where they had been hiding and started to advance towards the accused and surrounded him. In a bid to escape, the accused fired a shot aimed at one of the intruders who was leading the gang. The shot was aimed at his leg, but it appears that the accused missed his target and the stray bullet hit the deceased who was in the bush. The accused did not aim to kill the deceased, nor did he realise that he would kill the deceased. The accused was acting in defence of property and in his own self defence.

*The State's evidence*

The State produced the post mortem report by consent of the defence. It states that the death of the deceased was due to pneumothorax, left lung laceration and severe back thoracic trauma due to bullet injury.

The State then produced the CID Forensic Ballistics Report. It shows that the 12 Bore Baikal shotgun that was used by the accused to kill the deceased was functional. There were 4 spent cartridges, but it could not be ascertained when the firearm was fired.

The State then led evidence from Simba Forichi who was working as a general hand at the mine. He was also working with Tafara Mabheju and Fungai Sithole and the three of them were staying at the mine house. He said that the accused who was employed by Fawcett Security Company was providing security guard duties at the mine and he was the sole security guard. He would carry out his guard duties at night only.

Simba Forichi said that on 27 February 2022 him and his two colleagues retired to bed at around 8pm. At around 2 am the accused came knocking on their door saying that there were intruders at the mine. When they all went out of the house, they did not see the accused. They proceeded to the mine site where they met with the accused. The accused told them that the intruders had entered the mine shaft. He requested them to enter the mine shaft to check if the gold ore had not been stolen. Simba Forichi said that he then entered the mine shaft and noticed that some gold ore had been stolen. He came out and advised everyone that some gold ore had been stolen. At that point the accused fired a shot in the air. Thereafter the four of them including the accused left for the mine house.

As soon as they arrived at the mine house, they heard the sound of a moving motor vehicle near the mine site. The accused invited them to follow him as he went out to investigate. He suspected that the motor vehicle had come to ferry the stolen gold ore. Simba Forichi said that they followed the accused from a distance as they were not armed. They decided to wait for the accused by the gate. They then saw the accused who had a torch light coming back to where they were. He was talking to himself. They asked him what the problem was. The accused said that he had been trying to shoot the motor vehicle, but he ended up shooting a person. The accused was distraught. He was saying he now wanted to kill himself because he was afraid of going to prison. Simba Forichi said that realising that the accused was now suicidal, they strongly counselled him out of fear that he could also kill them first before killing himself. They even told him that it was possible that the person he had shot was not even dead. After convincing him not to kill himself, they all agreed to go and sleep in the mountain as they were afraid that the intruders could come for them at the mine house and attack them.

Simba Forichi said that at day break the accused phoned the owner of the mine and his superiors informing them of what had happened. The owner of the mine was the first to come at around 7am. He suggested that they do a perimeter check at the mining site. When they did, they got to the scene where they saw the body of the deceased lying in a drainage. They then phoned the police advising them of what had happened. The police had no motor vehicle for them to come the scene. So, Simba Forichi and his crew went and collected them using their motor vehicle. The police then attended the scene and ferried the body of the deceased to the mortuary.

This witness said that he had worked at the mine for 1 ½ years but he had no idea about the frequency of thefts at the mine. He also did not know the quantity of the gold ore that was stolen on the fateful night.

About the shooting of the deceased, Simba Forichi said that the accused explained that he had found the motor vehicle loading some gold ore. When he tried to shot at it, he mistakenly shot a person. The witness said that the accused never told them that he had been attacked by the intruders.

During cross examination Simba Forichi said that the mine house where they were staying was about 100 metres away from the mine site. The witness said that from the house they could not see what was happening at the mine site because of the distance and also because it was dark. He said all in all on the night in question he heard 3 gunshots. The witness said

that when the accused confronted the intruders, he and his 2 colleagues were about 1 kilometre away. The witness said that it is a common occurrence for intruders to invade mines in the area and this was not the first occurrence at the mine where he was working.

What is noticeable about this witness' evidence is that the witness said that the accused never told the witness and his colleagues that he had had a confrontation with the intruders. The accused simply said that in trying to shoot the motor vehicle, he shot a person. The picture painted is that the accused missed the motor vehicle and shot the deceased.

Happymore Mushungwasha who was the initial investigating officer of the case testified as follows. He is stationed at CID Bindura. The police received the report of the death of the deceased on 28 August 2022. Since the police had no motor vehicle, they were ferried to the scene of crime by the owner of the mine using his motor vehicle. When he attended the scene of crime with other police officers, he observed that the body of the deceased was lying facing up in a shallow stream near some shrubs. They examined the body and observed a big gunshot wound at the back, at the shoulder blade. That point was the entry point of the bullet. The body had no exit wound which meant that the bullet had remained lodged in the body of the deceased. The body had no other injury.

The witness said that the accused who had said he had fired the gun at some intruders gave them the gun he had used. He also gave them 4 spent cartridges that he said he had picked up. The witness said the gun and the spent cartridges were sent to CID Forensic Ballistics who then issued a report. The witness also said that he is the one who recorded the warned and cautioned statement from the accused. He said that the accused gave his statement freely and voluntarily. Although the statement was not confirmed, the defence could not object to its production by the State. The statement was recorded on 14 March 2022. The witness said that no weapon was recovered where the body of the deceased was found lying. He said that he learnt that 7x 25 kg of gold ore that had been stolen by the intruders had been recovered. He said that he did not inquire much about the stolen gold ore because that was not the case that he was investigating. The witness said that the wound that they observed on the body of the deceased is consistent with a person who was not facing the deceased at the time of being shot.

During cross examination the witness explained that he was the initial investigating officer before he was transferred from the investigations section to a different section at CID Bindura. He said that when he attended the scene together with his colleagues, they did not take any photographs. He confirmed that he established that the deceased was one of the

intruders at the mine. However, he was not able to establish how many intruders had invaded the mine with the deceased. The witness said that he did not observe anything that suggested that the scene had been tempered with before their arrival to inspect it. The witness said that nothing showed that when the accused fired his gun and shot the deceased, he was under any form of threat. He said this was because when the accused fired his gun, the motor vehicle sped off from the scene where it was loading some gold ore. The deceased went into hiding. When the accused heard some movements that is when he fired and shot the deceased. When it was suggested that other intruders were attacking the accused whilst the deceased was fleeing, the witness said that the accused therefore ought to have shot at those intruders that were attacking him and not at a person who was fleeing.

The witness said that he established that the body of the deceased was 5-8m away from the point where the motor vehicle which was loading the gold ore was parked. He also established that the accused shot the deceased at close range at a distance of 5-6 metres. The conclusion was based on the fact that the accused used a shotgun. He explained that a shotgun has a cartridge which has some pellets inside. When the gun is fired, it releases a bullet which is whole but after a distance of at least 10 metres, the bullet breaks into several pellets. In the present case when the bullet hit the deceased it had not yet broken into several pellets suggesting that the gun was fired at close range. The hole it created when it entered the deceased's body was big which also showed that when it hit the deceased it had not yet broken into several pellets. The bullet did not exit the body because there was no exit wound on the body.

This witness said that he is the one who recorded the accused's warned and cautioned statement. He said that the accused gave his statement freely and voluntarily. The State went on to produce the statement with the consent of the defence counsel. In the statement the accused said that around 0200 hours he saw some rubbers arriving at the mine. He fired a warning shot, but the robbers did not run away. Instead, they ordered him to come closer so that they could kill him. They had shining objects. So, the accused ran away. He went to the hut where three men who were working at the mine were sleeping. He awakened them and together they went up the mountain. From there they went back to the hut to collect their cell phones, so that they could phone the owner of the mine and Fawcett Security. After that they returned to the mountain where the accused made phone calls. Around 0400hours the accused saw some lights of a motor vehicle coming towards the mine. He assumed that it was coming

to collect the stolen gold ore. The accused said that he immediately climbed down the mountain alone so that he could capture its registration number. When he was approaching, the motor vehicle took off and he fired a warning shot but it did not stop. He then saw 7 sacks of gold ore. The accused said that he heard movements in the bushes and fired a shot towards the movements. He saw a man falling down and assumed that he had fainted. The accused said that he returned to the mountain where the others were hiding until the mine owner arrived around 0700hours. After telling him what had happened, they all carried a perimeter check and saw an adult male dead body lying near a stream outside the mine boundaries. They then went to ZRP Shamva and filed a report.

Hilda Chindoko who is a police officer who took over investigations from Happymore Mushungwasha after Happymore Mushungwasha had been transferred from investigations section also testified. Her evidence was simply that she collected the post mortem report from Parirenyatwa hospital. She sent the firearm to CID Forensic Ballistics for examination. She also recorded witness statements. She further said that the accused made some indications at the scene of crime but he did not sign them saying that he wanted to sign them in the presence of his lawyer. However, he never turned up with his lawyer. The accused had said that the lawyer was going to be supplied by his employer, Fawcett Security Company. Resultantly, the State did not produce the indications as an exhibit.

#### *The defence's evidence*

During the defence case the accused adopted his defence outline as part of his evidence. In explaining what happened on the fateful night the accused said the following. He started his shift at 6pm on 27 February 2022. At around 2am and as he was seated up the mountain at a distance of about 20m from the mine shaft at a position that allowed him to see what was happening around the shaft, he saw some intruders approaching. He walked for about 10m towards the mine shaft as he was shouting asking who these people were and what they wanted at the mine at such an odd hour. They responded daring him to come closer saying they wanted to kill him. The accused said that he then fired a warning shot, but instead of running away, the intruders started charging towards him. He could see them by the torch lights they were carrying. There were 7 to 10 people. The accused ran to the mine house where 3 mine workers were sleeping. The distance was about 100 metres. He awakened them telling them that there were thieves at the mine. He asked them to come out. He ran up the mountain again fearing

that these intruders might be following him. When the three mine workers followed him, he got down the mountain and joined them. The four of them went to the mine shaft to see if the intruders had not stolen some gold ore. The mine workers went down the mine shaft and confirmed that some gold ore had been stolen. The accused said that he then fired a warning shot to scare away the intruders just in case they were still close by. The accused said that he hoped that the intruders would disperse and not follow him and the mine workers. The accused said that as they were now walking going back to the mine house, they saw some motor vehicle lights. The motor vehicle was heading towards the mine. The accused said that he decided to go back to the mine so that he could take note of the motor vehicle's registration number. The mine workers remained near the mine house. As he was approaching the motor vehicle, he fired a warning shot with the hope that the intruders would flee and leave the gold ore. At that time the motor vehicle sped off. The accused said that he observed that there were no people at the area. He got to the spot where the motor vehicle was parked and saw 7 x 25 or 30kg sacks of gold ore. The accused said that he then decided to go to the mine house where he had left the mine workers, but before he had gone far, some 4 – 5 men emerged from the bushes and surrounded him from all directions at a distance of 4-5m away each from him. They were carrying machetes. One of them whom the accused presumed to be the gang leader made utterances to the effect that this was the end of the accused's life. The accused said that faced with imminent death, he decided to shoot him and make good his escape. He fired a shot and immediately escaped without stopping to see whether or not he had hit his target as his main concern was to run for dear life.

The accused said that he only got to know that he had shot and killed a person at daybreak around 7am when the owner of the mine came after he had phoned him and they discovered the body together as they were doing a perimeter check of the area. The accused said that he was not sure whether the person that he shot was the gang leader or somebody else.

During cross examination the accused said that at the time of the incident he had worked for Fawcett Security Company for almost 5 years. Before qualifying for the job as a security guard he had been trained for one week in handling firearms. The accused said that the mine in question is in a very dense forest and there are no security features at all. He said that he had worked at the mine for 15 days and before that incident there had been one incident where intruders came. He fired a warning shot and they fled.

The accused said that on the fateful night he was using a torch. The accused said that he rated his marksmanship to be 80-90%. The accused said that he could have missed his target out of fear as his life was in danger. When asked to explain how he had shot the deceased at the back, the accused said that it was possible that when other intruders had surrounded him, the deceased was busy carrying a sack of gold ore. He said that at day-break the deceased's body was found close to a sack with gold ore. The accused said that he is well trained in handling a firearm. He cannot shoot anyone who is escaping or running away. The accused admitted that he shot the deceased at close range-within 10 metres because the whole bullet of the shotgun entered the deceased's body before breaking into pellets. The accused said that the warned and cautioned statement that he gave to the police was given under duress. The accused said that when he fired the fatal shot, he was defending himself and the property. The accused said that it is not reasonable for him to shoot a person who is not attacking him. The accused said that his torch light was illuminating for a distance of about 5 metres. Its batteries were almost running flat. The accused said that without the torch light visibility was very poor because the mine is in a very dense forest. The mine is 100m x 200 metres in size. The accused said that night he did not have his phone because its battery had died. There was no electricity. So, he was not able to alert his employer or the owner of the mine of what was happening. The accused said that he had to use the phone of one of the mine workers at day-break to phone the owner of the mine and his employer. The accused said that he had no radio because there was no network for radio communication in the area.

#### *Analysis of evidence*

That the accused shot the deceased is common cause. Mr *Masamha* submitted that the accused raised two defences: self-defence and defence of property. On the other hand, Mr *Chidziva* submitted that the accused raised three defences as complete defences: necessity; self-defence; and defence of property. The crucial question therefore is: was the killing of the deceased justified at law? In order to answer this question, it is necessary to get the facts of the matter correct. It is important to establish what really happened when the accused shot and killed the deceased. The key questions are: was the accused's life in danger? Was the property i.e., the gold ore that the accused was guarding in danger?

It is common cause that the accused was the sole eye witness to the shooting incident that led to the death of the deceased. He was obviously charged on the basis that he is the one who shot and killed the deceased. We hasten to point out that the burden of proof remains with

the prosecution when the defences of self-defence and defence of property are raised. The prosecution must adduce sufficient evidence to satisfy the court beyond reasonable doubt that the accused was not acting to defend himself; or not acting to defend property; or that if he was so acting, the force used was excessive. Whilst the accused has no duty to prove his innocence, he has a duty to lay sufficient foundation for his defence to enable the State to rebut that defence.

As was correctly submitted by Mr *Masamha*, what forms the basis of accused's prosecution in this case are the facts that arose when the accused returned to the mine, when he said he saw the motor vehicle lights heading to the mine. The first piece of evidence against the accused came from Simba Farichi. According to Simba Forichi, when the accused came back to where they were, he was talking to himself. When he asked him what the matter was, the accused said that he had tried to shoot at the motor vehicle, but he ended up shooting a person. According to Simba Forichi, the accused did not explain the nitty gritty details of how he had ended up shooting the deceased. Simba Forichi said that they never concerned themselves with these details because the accused was distraught and was contemplating suicide. They concentrated on counselling him and taking measures to protect themselves lest the intruders decided to revenge hence they ended up going to hide in the mountain until daybreak.

What is clear from Simba Forichi's evidence is that the accused never told Simba Forichi and the other mine workers that when he shot the deceased, he had been surrounded by 4-5 intruders who were wielding machetes and were telling him that this was the end of his life as they were advancing towards him. We also take note that after the accused, Simba Forichi and the other two mine workers fled to the mountain out of fear of being pursued by the intruders, they spent about 3 hours before the owner of the mine came at day-break after they phoned him. In those 3 hours the accused never explained that he had shot deceased after he had been surrounded by the intruders and that his life had been endangered. So, as far as Simba Forichi's evidence is concerned, the accused never gave an explanation that showed that he was acting in self-defence or in defence of the gold ore when he shot the deceased. Instead, he gave the impression that he shot the deceased by mistake.

The second piece of evidence against the accused came from the investigating officer Happymore Mushungwasha who said that the gunshot wound that the deceased sustained showed that when he was shot, he was not facing the accused. He said that the deceased could therefore not have been attacking the accused. Mr Mushungwasha said that under the

circumstances the accused was not acting in self-defence when he shot the deceased. The investigating officer's reasoning and explanation is logical and it makes a lot of sense.

The third piece of evidence against the accused was his own warned and cautioned statement which the State counsel produced with his consent. It was produced as evidence against the accused. In the warned and cautioned statement the accused said that when he saw the lights of a motor vehicle which was going towards the mine, he assumed that it was coming to collect the stolen gold ore. He said that he climbed down the mountain to capture its registration number. When he was approaching, the motor vehicle took off. He fired a warning shot but the motor vehicle did not stop. He heard movements in the bushes and he fired a shot towards the movements and saw a man falling down. The accused said that he assumed that the man had fainted and returned to the mountain where the mine workers were. Again, the accused never mentioned that when he fired the fatal shot, he was surrounded by 4-5 men who were armed with machetes and were threatening to end his life. The accused also did not explain in the statement why he decided to shoot in the direction of the movements that he had heard.

Mr *Masamha* submitted that what is clear from the accused's warned and cautioned statement is that when the accused fired the fatal shot, no attack had commenced upon him or was imminent upon him as per the requirement of s 253(1)(a) of the Criminal Law Code. He submitted that the accused's conduct of shooting was therefore not necessary as there was no attack to avert. We are in agreement with the observations and submission made by Mr *Masamha*. This is because whilst an accused is not obliged to say anything in answer to the allegations against him or her in his or her warned and cautioned statement, his or her failure to mention any facts relevant to his or her defence may result in the court drawing inferences which can be treated as evidence corroborating other evidence against him or her. See s 257 of the CPEA and John Reid Rowland *Criminal Procedure in Zimbabwe* LRF 1997 @ 20-23. The accused may not be believed if he or she fails to mention relevant facts that are material to his or her defence in the warned and cautioned statement and only raises them later at trial. In *casu* the accused would have helped himself if he had gone on to explain in his warned and cautioned statement why he decided to shoot in the direction of the movements that he had heard. His failure to give an explanation is not in itself evidence against him, but it corroborates the State's evidence that when he shot at the deceased, he was not under attack by the deceased who was giving his back to him as evidenced by the gunshot wound at the deceased's back.

The fourth piece of evidence against the accused person was the defence that he proffered at trial. For the very first time, the accused said that he fired the fatal shot after he had been surrounded by 4-5 intruders from all directions and that these intruders were wielding machetes and threatening to end his life. This was a complete departure from the version that he gave to Simba Forichi on the day of the incident. If we go by the version that the accused gave to Simba Forichi, he was trying to shoot the motor vehicle when he missed it and instead shot the deceased. The accused's version at trial was also a departure from the version that he gave in his warned and cautioned statement. In the warned and cautioned statement he said that he fired the fatal shot after hearing some movements, after the motor vehicle had sped off and after he had already fired a shot for it to stop. So, all in all accused who was the sole eye witness to the shooting incident gave three varying accounts of what happened at the time he fired the fatal shot that killed the deceased. The first account was what he told Simba Forichi. The second account was what he said in his warned and cautioned statement. The third account is what he said during trial. Obviously the three versions that the accused gave, cannot all be true because they are inconsistent.

What we can say with absolute certainty is that the third account that the accused gave during trial of being surrounded by 4-5 menacing intruders was just but a lie. We say this because he never said it to Simba Forichi a few minutes after the shooting incident. If this is what had really happened, the explanation would have come out naturally. However, considering that the accused was very shaken soon after the shooting, one can excuse him for failing to fully explain the circumstances of the shooting to Simba Forichi. What is pertinent though is that the accused then gave his warned and cautioned statement to the police on 14 March 2022, two weeks after the incident. However, the accused failed again to explain or disclose that he shot the deceased after having been surrounded by the armed intruders. By this time the accused had had enough time to gather his thoughts about what happened on the fateful day. He had been warned and cautioned that he was now facing a murder charge for shooting and killing the deceased. Surely this was his time and chance to explain what had prompted him to fire the shot that ended up killing the deceased. The explanation that he had been surrounded by people who were threatening to kill him as they wielded matchets should have come out naturally from the accused. It is an explanation that he did not even need to think about. The accused did not need more than a year to give this explanation. For this reason, we believe that what the accused said during trial more than a year after the incident

had happened was just an after-thought. This is the reason why he was now trying to deny the account that he had told Simba Forichi and what he said in his warned and cautioned statement. The accused was now saying that he never told Simba Forichi that he had shot a person. Surely Simba Forichi could not have made up this story. He had no reason to do so. In any case what Simba Forichi said went uncontroverted by the defence during the State case. Simba said that the accused was very distraught and wanted to kill himself. He said that they had to counsel and reassure the accused that there was no need for him to kill himself. All this was not challenged when Simba was on the witness stand. The accused then sought to say that he was in bad books with one of Simba Forichi's workmates. We do not believe this because it was clear to us that this was just being said as an afterthought as it was never put to Simba. However, even if it is accepted that that averment was true, the accused did not explain why Simba Forichi who had no issues with him would then lie against him. We were impressed by the evidence of Simba Forichi as we did not see why Simba would lie against the accused.

The accused was now saying that he had told the investigating officer that he had fired the fatal shot after being surrounded by the intruders who were wielding machetes and were threatening to kill him, but the investigating officer omitted this information when he recorded the warned and cautioned statement. We do not see why the investigating officer would leave out this information if the accused had said it to him. If this is what happened, we wonder why the accused agreed to sign the warned and cautioned statement. The accused could have refused to sign it the same way he refused to sign the indications form in the absence of his lawyers after he had been taken for indications by the police. The accused wanted to give the picture that even the police plotted against him yet under the circumstances of this case we failed to see why the police would do that. In any case if the warned and cautioned statement was not a true reflection of what the accused said, the accused through his legal practitioner, would have objected to its production during trial. The fact that the defence raised no objections is sufficient proof that the statement is what the accused said to the police and he said it freely and voluntarily.

The foregoing shows that Mr *Chidziva* was not correct when he submitted that the accused's version that he was under attack when he fired the fatal shot was not challenged by the State. Yes, none of the State witnesses witnessed the shooting incident, but what they said served to show that the accused's version in court is not the truth of what happened when he shot the deceased. The accused was his own enemy in this whole case. He gave three different

accounts from the beginning of the case up to the end. The version that he gave to Simba Forichi is not the version that he gave to the police. The version that he gave to the police is also not the version that he gave in court. The version that he gave in court is not the version that he gave to Simba Forichi. The accused did not impress us as a credible witness. For the reasons discussed above, we thus reject the version that the accused gave in court. Whilst no onus rests on the accused to convince the court of the truth of any explanation that he gives,<sup>1</sup> in the circumstances of the present case we are satisfied that the explanation that the accused gave during trial of being surrounded by 4-5 men and being threatened with death at the time that he fired the fatal shot is beyond any reasonable doubt false. He did not mention it to Simba Forichi and neither did he mention it in his warned and cautioned statement.

The problem with the version that the accused told Simba Forichi is that it had no information about the circumstances surrounding the shooting. The accused simply said that he had missed the motor vehicle and shot a person. The accused did not say much.

We will go with the detailed version that the accused gave in his warned and cautioned statement to the police after he had been warned and cautioned that he was now facing a murder charge. The investigating officer said that it was freely and voluntarily made by the accused. Although it was not confirmed, the defence consented to its production in court, without challenging its admissibility. By not challenging its admissibility, the defence thus accepted that the accused gave the statement freely and voluntarily without having been unduly influenced to make it. The accused thus accepted the statement as the truth of what transpired. When we go by that statement, the accused's defences of self-defence and defence of property cannot be sustained because during trial he laid no foundation for them. The mistake that the accused made is that he departed from his warned and cautioned statement and sought to raise these defences based on fabricated facts to the effect that he had been surrounded by the intruders who were wielding machetes and were threatening to kill him. We have already rejected this explanation on the basis that it is false. As such the accused's defences of self-defence and defence of property cannot stand since he had sought to base them on false facts. Therefore, it is just as good as the accused did not raise any defence at all. If the accused had stuck to his warned and cautioned statement to the police all he needed to do during trial was to explain why he had shot at the movements in the bushes after the motor vehicle had sped off from the scene. It is from this explanation that the court would have assessed whether or not

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<sup>1</sup> *Rex v Difford* 1937 AD 370 @ 372.

his explanation satisfied the requirements of the defences of self-defence and defence of property. In the absence of an explanation by the accused himself laying the foundation of these defences during trial, we have nothing to analyse. The only evidence that we have is what the State presented which was to the effect that the accused heard some movements and shot towards those movements. This is according to what the accused said in his warned and cautioned statement. He did not say anything that suggests that he was acting in self-defence or in defence of property.

By saying that he heard some movements, the accused implied that he did not see any person(s). So, if the accused did not see any person, it means that he was not under attack. If the accused had reason to believe that an attack was imminent upon him, he ought to have shown that during trial. An accused has a duty to introduce his or her defence by putting it to the State witnesses who are being cross examined. See *S v Nkomo* 1975 (3) SA 598 (N). However, this does not mean that there is an onus of proof upon the accused. This is simply meant to enable the State to disprove his or her defence. It is not for the court to build a defence for the accused nor is it for the court to speculate or make assumptions on why the accused acted in a particular manner. In *casu* it is not for us to speculate or make assumptions on why the accused shot towards the movements that he heard. Things are even worsened by the fact that the accused shot the deceased at the back. This means that the deceased was not attacking the accused when he was shot. It is either the deceased was squatting hiding giving his back to the accused or the deceased was now in the process of fleeing after seeing the accused. Only the accused could have explained what was happening when he shot at the deceased. His failure to explain means that he did not adduce evidence that shows that there was an imminent attack upon him when he shot the deceased. The State therefore managed to show that the accused unlawfully killed the deceased.

What is of critical importance though is that the State did not adduce any evidence to show that when the accused shot at the deceased, he was actually seeing the deceased. In that regard, we will take the accused's explanation that he simply shot towards the movements that he had heard. If the accused shot towards the movements, without seeing any person, it cannot therefore be said that he fired the gun with the intention to kill a person. He could not have intended to kill a person when he was not seeing any person. However, we will take it that he was negligent in his actions. He had just fired at a motor vehicle that was loading some gold ore. Obviously, he knew that there were people that had been loading the gold ore onto the

motor vehicle. Chances that the movements that he had heard had been caused by people were very high. A reasonable man would have foreseen that by shooting in the direction of the movements there was a reasonable possibility that he could cause harm to a person or to persons and would have taken steps to prevent such harm. The accused thus fell below the standard of a reasonable person. It is our considered view therefore that the accused negligently caused the death of the deceased.

For an accused to escape a conviction of murder in a case where he or she kills in defence of property, he or she has to lay the foundation of his or her defence by giving evidence which satisfy the general requirements outlined in s 257 and the specific requirements outlined in s 258 of the Criminal Law Code. In terms of s 257, the accused must give evidence which shows that when he or she did what he or she did, the unlawful attack on the property had commenced, or was imminent; his or her conduct was necessary to avert the unlawful attack; the means that he or she used to avert the unlawful attack on the property were reasonable; the harm or injury caused by the accused's conduct was caused to the attacker and not to an innocent third party and that the harm or injury was not grossly disproportionate to that liable to be caused by the unlawful attack. In terms of s 258, the accused should further show that he or she resorted to killing after taking all other possible steps to protect the property concerned; the property could not have been defended by any means except by killing; the property concerned was of vital importance to him or her, and that he or she believed on reasonable grounds that he or she would not receive adequate compensation for any destruction, damage or injury caused to the property concerned by the unlawful attack. It is unfortunate that in raising this defence, the accused based it on false or fabricated facts of having been surrounded by 4-5 men who were threatening to kill him. We have already rejected the fabricated facts. We therefore take it that the accused laid no foundation for this defence. So, the defence of property cannot operate in his favour.

In view of the foregoing, the accused is found not guilty and acquitted of murder, but guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act.

### *Sentence*

In mitigation we considered that the accused person is a young man who was aged 27 years old then. He is 28 years old now. This is his first conviction. He is responsible for the

upkeep of his diabetic mother and two siblings. The accused committed this offence in the line of duty. He was all by himself throughout the ordeal from 2 am to 4am with the intruders who were giving him a torrid time.

What aggravates the offence though is that there was loss of human life. It is pathetic that we lost a teacher to gold panning which was committed in the middle of the night and in the middle of nowhere. However, we do sympathise with the accused considering the circumstances that he found himself in on the night in question. The accused was providing security guard duties at the mine alone. The deceased in the company of his colleagues had invaded the mine in question that night. When the accused confronted them around 2 am they dared him he saying that they wanted to kill him. They were armed with shining objects. Even though the accused was armed with a shotgun, they scared him by not retreating when he fired a warning shot. The accused got scared for his life and ran away. The deceased and his colleagues did not relent. They went on to steal some gold ore from the mine shaft. They then brought a motor vehicle to collect the gold ore that they had stolen. Upon seeing the motor vehicle lights, the accused went back to the mine shaft. He said that his intention was to take note of the motor vehicle's registration number. Unfortunately, the motor vehicle sped off when he fired a shot. Unbeknown to the accused, some intruders had remained at the scene and had gone into hiding. When he heard their movements, his immediate reaction was to shoot in the direction of the movements. This is how the deceased was shot at a distance of 5-6 metres. The accused must have been very scared because these are the same people that had threatened to kill him earlier on. There is no doubt that the deceased did put his life at risk by invading a mine that was guarded by an armed security guard. To make matters worse, despite the accused person firing three warning shots before, the deceased and his colleagues were unrelenting. They were determined to take some gold ore from this mine. Things did not end well for the deceased for he ended up meeting his death at around 4am.

The extent of the negligence in culpable homicide cases plays an important role in arriving at the appropriate sentence which should neither be too severe nor too light. See *S v Mashego* (CC 142/2017) [2019] ZAGPPHC 95. In *casu* as already highlighted above, the degree of the accused's blameworthiness is very low. He had done all he could to scare away the deceased and his fellow intruders but they did not take heed. The accused was also now very scared for his life hence his actions of just shooting in the dark. Considering the circumstances of the case holistically, we are of the considered view that a wholly suspended sentence will meet the

justice of the case. By imposing a wholly suspended sentence we are not disregarding the actual consequences of the accused's negligence. If anything, we are aware and alive to the fact that a wholly suspended sentence is not a sentence which is lightly imposed. Even though there is no rule which says that for a wholly suspended sentence to be imposed the court has to be satisfied that special or exceptional circumstances exist, special or exceptional circumstances would have to be shown before the court would be justified in wholly suspending a sentence. See Prof. G. Feltoe *Magistrates Handbook* Revised Ed, 2021 @ 433. The requirement is even more in serious offences which ordinarily attract sentences of effective imprisonment. The court should sentence the accused with a full appreciation of the accused's own particular circumstances at the time of the offence. See *State v Warren Vorster* (Case number 125/2009 in the South Gauteng High Court). In *casu* the accused was caught in a very difficult situation as already explained elsewhere above and the situation constitutes exceptional circumstances. The accused's situation is even worsened by the fact that soon after shooting the deceased, he was very emotional. Obviously, he suffered trauma. He even wanted to commit suicide. Fortunately, Simba and his colleagues managed to successfully counsel and convince him not to. In imposing a sentence, a court must be merciful. True mercy is an element of justice. See *S v V* 1972 (3) SA 611 (A) at 614. In the circumstances of this case, the accused deserves mercy and a wholly suspended sentence is justified. We do not believe that the imposition of a wholly suspended sentence is likely to cause the public to lose confidence in the justice system nor is it likely to tempt people to take the law into their own hands. This is not a bad case of culpable homicide which renders a wholly suspended prison sentence inappropriate.

Accused is sentenced to 5 years' imprisonment which is wholly suspended for 5 years on condition he does not within that period commit an offence involving the negligent killing of another person and for which upon conviction he is sentenced to imprisonment without the option of a fine.