

THE STATE
versus
PROSPER CHAGUNDA

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 8 March & 16 June 2023

Criminal Trial

Assessors: Mr Barwa
Mr Kunaka

V Ngoma, for the State
D V Gapare, for the accused

MUNGWARI J: Prosper Chagunda of Ndamba village in Mudzi (hereinafter referred to as “the accused”) appeared before us charged with the crime of Murder in contravention of s 47(1) of the Criminal Law(Codification and Reform) Act [*Chapter 9:23*] (hereinafter referred to as “the Code”) The allegations against him are that on 22 April 2022 at Mapombo business centre in Mudzi, he unlawfully and intentionally caused the death of Nyasha Mungazi (hereinafter referred to as “ the deceased”) by striking him with a log on the head or realizing that there was a real risk or possibility that death may occur, persisted with his conduct despite the risk or possibility. The deceased died from the injuries sustained during the attack.

In detail, the state’s allegations are that on the night of 22 April 2022 the accused who had a long-standing grudge with the deceased, spotted him standing at Tsoka shop. He was holding his phone. The accused armed himself with a log and approached the deceased. Without any provocation whatsoever, the accused struck the deceased on the head with the log. The impact caused the deceased to fall to the ground. He started bleeding from his mouth, nose and head. The accused fled the scene. One Sylvester who had witnessed the assault gave chase but was outsprinted. He was unable to apprehend the accused. A short while later, the accused returned to the scene with a half brick in hand. He threatened to strike the deceased again. Some patrons from nearby shops disarmed him while others rendered first aid to the deceased. The

deceased's father was informed of the incident and quickly made his way to the scene. He ferried his son to the hospital where he died shortly after admission. A post mortem examination conducted upon the remains of the deceased concluded that the cause of death was intracranial hypertension, global subdural hematoma and severe head trauma.

The accused pleaded not guilty to the charge and presented a long and rambling defence outline. The gist of which is as follows:

He claimed that he acted in self-defence when he struck the deceased with a log. The deceased had unlawfully attacked him. He explained that he had been bullied and harassed by the deceased for a long time. The deceased also mocked him by making reference to his crippled hand and being an orphan. All those issues, so he argued, made him a vulnerable member of society. In 2018, the bullying reached a crescendo. It morphed into a robbery attack by the deceased as a result of which the accused sustained serious injuries and lost his phone and money. After the incident the deceased fled the area and was not seen again. He only returned two years later in 2020. The accused said he met him by chance. The deceased allegedly declared that there was still bad blood between them and that the grudge could only cease with the death of the accused. From that day onwards the accused lived in constant fear of being attacked by the deceased. On the day in question, he went to the shops to buy meat for supper. While he was in the shop, the deceased demanded that he approach him. The accused refused. That refusal angered the deceased. In front of everyone in the shop, the deceased loudly declared that the accused should bid farewell to those around him, as they would be the last people to see him alive. The deceased held a long object in his hand which added to the accused's trepidation.

Due to the deceased's threats, the accused's father-in-law *Chinake Chinake* who was nearby and had heard the commotion, advised the accused that it was not safe for him to walk alone and that he required an escort to go back home. The father-in-law and another man escorted the accused for a short distance before leaving him. As the accused continued on his way home, the deceased suddenly appeared and attacked him with a stone, hitting him on the elbow. The accused ran back to the shops to seek assistance. He had to stay at the shops until when it was almost 10pm before he attempted to head home once more. However, the deceased suddenly appeared out of nowhere and startled him. In a state of panic, the accused instinctively picked up a nearby object and hit the deceased on the head with it. He then ran back towards the shops. He had a stone in hand, fearing that the people at the shops would assault him for causing the injuries on the deceased. When he realized that they were not going to attack him,

he settled down to assist the deceased and poured water on him in an attempt to revive him. He told the court that he never intended to kill the deceased but had acted in self-defence as he feared for his own his life. In his view, the blow that he dealt to the deceased was not fatal. The deceased died due to the delay in getting medical attention.

The state's case

The prosecution opened its case by seeking admission of the autopsy report compiled by Doctor *Yoandry Olay Mayedo* a pathologist stationed at Parirenyatwa Hospital on 28 April 2022. During the examination, of the remains of the deceased, the doctor noted serious head injuries. These included, a right temporal parietal subdural hematoma, a bone fracture on the skull and a global subdural hematoma. He concluded that the cause of death was due to intracranial hypertension, global subdural hematoma and severe head trauma. The presence of a skull bone fracture indicated the likelihood of an act of severe violence having been perpetrated on the deceased. With the consent of the defence, the postmortem report was admitted into evidence as exhibit no 1 and the cause of death became uncontentious.

The court also admitted the accused's confirmed, warned and cautioned statement which was recorded at ZRP Makosa on 26 April 2022 and confirmed by a magistrate sitting at Mutoko Magistrate's Court on 12 May 2022. The statement was admitted with the consent of the defence as exhibit no 2. In the statement the accused mentioned the following under caution:

“Indeed, I have understood the warned and cautioned statements of the offence. The allegations I am facing are true and that is what happened. This happened whilst defending myself from the deceased person who always assaulted me. I struck him once with a log intending to get a chance to escape from him since I was afraid.”

The sketch plan depicting the crime scene was also tendered. It was drawn by sergeant Mujakachi and witnessed by Constable *Gono*. It was drawn from indications made by *Sylvester Mucharwei*, *Chinake Chinake*, *Givemore Tsoka* and *Madya Mungazi* who appended their signatures to it. It was produced and tendered as exhibit 3 and was admitted into evidence by consent.

In addition to the above, the evidence of police details Peter Mutize and Darlington Mujakachi was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as it appeared in the state's summary of evidence. It established the following relevant facts:

1. That *Peter Mutize* arrested the accused at his house, four days after he had deserted it. He handed over the accused to Darlington Mujakachi who had looked for him and could not account for him.
2. Peter Mutizhe investigated the matter and visited the scene of crime. He noticed blood stains on the wall of the shop as well as the floor where the attack took place.
3. A warned and cautioned statement was recorded from the accused according to law.

Oral Evidence

In addition to the above evidence the State led oral testimonies from Sylvester Mucharwei, Chinake Chinake, Givemore Tsoka and Madya Mungazi. We deal with the evidence below:

Sylvester Mucharwei (Sylvester)

The witness a 24 year old man was employed as a part time shop keeper at Makombo shop and was acquainted with both the deceased and the accused. The deceased was his friend whilst the accused was a regular customer at the shop where he worked. On the day in question, he was at *Tsoka* shop when he saw the deceased standing alone on the veranda, illuminated by the light from the shop. The witness went inside the shop to purchase pool table tokens. He returned a short while later, to find the deceased still standing on the veranda, seemingly scrolling on his phone. Sylvester proceeded to the snooker table, about five metres away from the deceased to attend to the tokens. While he was there, he heard a thud that sounded like a heavy stone hitting the ground. He switched on his torch and saw the accused running away from where the deceased lay, carrying a log that was approximately one meter in length and fifteen centimetres in diameter. The witness gave chase but failed to catch the accused. When he returned to the shop, he found the deceased lying on his back bleeding from the nose, mouth and the right side of his head. Some people were providing first aid to the deceased by pouring water on him. The accused reappeared holding a brick in his hands and attempted to strike the deceased. He was restrained by Chinake Chinake. Once the accused had calmed down, he approached the spot where the deceased lay and poured water on him. After a while the accused left the scene, leaving the deceased still fighting for his life.

Under cross examination, the witness insisted that the accused's intention when he reappeared was to finish off the deceased as he was angry and shouting at him. The defence counsel raised concern about the witness's relationship with the deceased and suggested that because he was friends with the deceased, he may have altered his testimony to protect the deceased's interests. However, the witness promptly clarified that his intention was to provide an honest account of what transpired. We were struck by the witnesses' candour. Despite his youth, he provided a clear and detailed chronological account of what he witnessed. Even under cross examination he remained composed and unwavering in his testimony. His evidence was crucial in shedding light on the events leading to the attack on the deceased. According to the witness, the deceased was standing alone, unarmed and in clear view on the veranda. He was engrossed in his phone when the attack occurred.

Chinake Chinake (Chinake)

The witness is a father-in-law to the accused and was a friend of the deceased. He testified that he had a good relationship with the accused and still has. He was present at the scene on the day of the incident and provided the following account:

At around 5pm-6pm, he was drinking beer in Sylvester's shop while the accused was buying groceries. He saw the deceased enter the shop threaten the accused, leave the shop and return shortly after to repeat his threats. He heard the shop owner reprimand the accused who had stood up spoiling for a fight with the deceased and he also stood up to restrain him. After the deceased left the shop, the witness went to *Mudzimu* shop and continued drinking beer. He did not see the accused or the deceased again. Some four to five hours later, at around 10pm he heard a loud thudding sound from Mudzimu shop. The sound was so loud that he could hear it over the sound of the radio playing in the shop. He observed people at the snooker table rushing to the veranda. He stood up and walked towards the door of the shop. He met Sylvester, the first state witness, who told him that the accused had hit someone and ran away. The witness approached the deceased, who was lying facing upwards, and noted the bloodied floor and some people trying to assist him. He went and stood close to the snooker table a few meters away. From that vantage point, he saw the accused approaching from the eastern direction while making some utterances which he could not put any meaning to. He watched as the accused picked up a half brick with the clear intention of throwing it at the deceased, who was still prostrate on the ground. According to Chinake, the accused is a naturally short-tempered man and at that moment he was visibly angry. The utterances that were directed at the accused

were a clear sign of anger. Chinake tried to restrain him from attacking the deceased with the brick, but he was overpowered. The strength that the accused exhibited was so great that he had to be restrained by four other men in addition to the witness. After a while, the accused calmed down and approached the deceased. He sprinkled water on the deceased, just as he saw others who were administering first aid do. After sometime the witness went home. Under cross examination the witness said that they escorted the accused before the assault for a short distance after the deceased uttered threatening words. He however turned back and went into *Mudzimu* shop to continue with his beer drinking. He did not witness the assault and didn't see the accused and the deceased until after the incident. The witness found himself in a difficult position, torn between his loyalty to his son in law with whom he had a good relationship and his duty to tell the truth in court. He prioritized the latter and chose to testify truthfully. It meant implicating his son in law. Although he was initially guarded, he opened up as he continued to give his evidence. His testimony was crucial in providing insight into the chronology of events leading up to the attack on the deceased. He revealed that the deceased had issued threats against the accused about five hours prior to the attack. He had accompanied the accused for a short distance as he headed to his house. Given the passage of time, he assumed that the danger had dissipated. Consequently, he resumed drinking his beer. He was surprised to hear that the accused had assaulted someone and fled. The witness's evidence also shed light on the accused's intentions. When he reappeared on the scene, he still intended to cause further harm to the deceased. The witness had to personally restrain him with the assistance of four other men. Overall, the witness's testimony was valuable in helping the court understand the events leading up to the attack and the accused's state of mind at the time. He was truthful.

Defence case

Prosper Chagunda

In his defence, the accused reiterated the story he had previously presented to the court and added detail to it. He explained that on the day of the incident, he had entered the shop at around 6 pm to make a purchase. The deceased then appeared and stood by the door, beckoning him over. However, due to their previous conflicts, the accused refused to approach him. The deceased then threatened that the people the accused was with would be the last people he would see. This frightened him. The deceased subsequently left the shop and Chinake advised him not to walk alone. Chinake left the shop to search for the deceased but to no avail while

the accused waited in the shop. An hour later he left the shop. He was escorted by Chinake and a colleague for some distance before they turned back. He continued on his journey home but encountered someone throwing stones at him about ten meters from the shop. He suspected it was the deceased since Chinake had searched for him but had not found him. He confirmed that it was the deceased. He ran back to the shops, hoping to find someone to help him but he did not. He then found an isolated place to sit as he tried to observe the movements of the deceased amidst the people present. After about thirty minutes he assumed it was safe to leave and took a different route home. However, he unexpectedly encountered the deceased again. He asked him what wrong he had committed and the deceased did not respond. Instead, he charged towards him causing him to move backwards in fear. He stumbled upon a place where a fire had recently been put out and grabbed a piece of firewood to defend himself against the accused, who was pursuing him. He struck the deceased with the firewood, causing him to fall on the veranda. The accused said he then fled towards an area with lights, with Sylvester following him holding a torch and stone. Sylvester caught up with him and informed him that he had badly injured the deceased. He immediately went back to the scene. The accused found a crowd gathered. He assumed that they were restraining him to allow the deceased to assault him. When he realised that the deceased was lying there injured, he approached him and poured water on him. He denied intending to kill the deceased and claimed that his only intention was to assault him and run away to his house.

Common cause facts

From all the evidence placed before this court it became common cause that:

1. The accused and the deceased held grudges against each other. As a result, their relations were strained.
2. The accused was threatened by the deceased with death some five hours before he fatally struck the deceased.
3. Later, the deceased stood alone on the veranda, attending to his phone. He was unarmed at the time.
4. From an isolated spot, the accused conducted a surveillance of the area and located the deceased. He then struck him with a log using severe force causing him to collapse immediately.
5. The accused returned to the scene and armed himself with a half brick and was uncontrollable. There was a mob of people at that time.

6. He was eventually restrained by a number of men who included Chinake.
7. He poured some water on the deceased who was bleeding and lying face upwards on the veranda. He then left for his place of residence leaving the deceased unwell.
8. The deceased's father arrived at the scene after he was informed of the incident at 10.30 pm. He looked for transport to ferry the deceased to hospital.
9. The deceased passed away four hours after the attack and while on his way to the hospital.

Issue for Determination

With these common cause aspects outlined, the issue which lies for determination is whether in causing the death of the deceased the accused acted in self-defence and resultantly lacked the requisite intention to sustain a charge of murder.

The Law

In this jurisdiction it is a well-established principle that a person has the right to take reasonable measures to protect themselves, a third party or their property from unlawful harm or attack. In terms of s 253 of the Criminal Code, self-defence is a complete defence if the following requirements are satisfied and these are that:

1. There must be an unlawful attack
2. The attack must be directed at the accused or a third party, where the accused intervenes to protect a third party
3. The attack must have commenced or be imminent
4. The action taken must be necessary to avert the attack and
5. The means used to avert the attack must be reasonable.

See the case of *S v Banana 1994(2) ZLR 271 (S) at 273*.

Analysis of evidence

The accused contradicted himself at every turn. He admitted to identifying the deceased as the person who pursued him at the shops and threw stones at him but failed to provide a satisfactory explanation as to why he would sit in an isolated place waiting to see who the culprit was. It is reasonable to assume that the accused was lying in wait for the deceased so that he could ambush him and deal with the threats that had been directed at him. This is supported by the fact that when he attempted to hit back at the deceased inside the shop for the first time he had been restrained. He had time to calm down. Instead, he loitered and lingered

around the shops for about five hours looking for an opportunity to strike. He even went to great lengths to track the movements of the deceased from a remote location prior to the assault. He finally got his chance when the deceased was busy on his phone and everyone else was attending to other business. Even after he struck the deceased, he returned for the second time intending to finish him off with a half brick. He only stopped after being restrained by Chinake. This suggests that he had pent up anger and intended to settle the matter with the deceased once and for all.

In his evidence in chief, the accused gave the impression that he assaulted the deceased a considerable distance away from the veranda of the shop. However, when asked during cross examination about Chinake's statement, that the deceased was lying on the veranda where he had been assaulted, the accused tried to reconcile his story by saying that he struck the deceased away from the veranda and he fell on to it. He was adamant that contrary to the state witness's explanation the deceased was not standing on the veranda. The intention was to convince the court that the deceased had posed a danger to him away from the veranda instead of on the veranda where the witnesses said that he was innocently scrolling on his phone with other people standing in the immediate vicinity. The further away from the veranda would have suited the accused's narrative. It was however not possible as the deceased was struck on the veranda and exhibit 3 which was the indications diagram clearly detailed this.

The accused admitted that he struck the deceased on the head with severe force causing him to collapse. He said that he thought he was under attack. He also admitted to causing the death of the deceased who was not armed. He equally conceded that there were people close by who included Sylvester and *Givemore Tsoka* but he did not seek their assistance or run away to avert any perceived danger. These concessions by the accused raise doubt regarding his assertion that he was under attack. Indeed, he had been threatened with death five hours earlier. The effluxion of time had dissipated that danger. In any case even if we are to go by the accused's own version, the deceased had only charged towards him and done nothing else. For these reasons, we reject his version that he was under attack as it is untrue. The deceased was on the veranda and did not pose any danger to him.

Surprisingly, when the deceased fell down the accused did not render any assistance to him if his intention was not to harm him but to ward him off. Even when he was informed that he had badly injured the deceased he still came back armed with a half brick intending to inflict more injuries. He only tried to render assistance after he had been pacified and had calmed down. It was then that he half-heartedly sprinkled water on the deceased. Even then he did not

stay long enough to ensure that the deceased regained consciousness. He also did not look for transport to ferry him to the hospital. He did not render any such assistance to the deceased despite it being obvious that he needed medical attention. The accused's explanation was that after he realized that the deceased was alive, he feared that the mob would assault him. That cannot be true. His own father-in-law was part of the mob. There was no reason for him to be scared particularly when him and four other men had already assisted him and calmed him down. The accused's actions were a complete contradiction to what was expected of someone who had injured another in self-defence. We hold therefore that his actions were as a result of the full realization of the consequences of his ill-advised belligerence. The state witnesses said blood was all over the veranda, walls and floor of *Tsoka* shop. The accused inflicted serious injuries aimed at the head which is a vulnerable part of the body using a log which he picked up from a dying fire. The post mortem report shows that the accused cracked the skull of the deceased. By splitting the skull, the accused must obviously have used massive force when he struck the deceased.

In view of the foregoing, we conclude that the accused was fully aware of the consequences of his actions when he sprinkled water on the deceased after striking him. Although he was horrified by the situation, he failed to stay and ensure that the deceased received medical attention, which was his responsibility as the one who caused the injury. Instead, he fled his home and remained at large for four days until his arrest.

In the court's view, the defence of self-defence is not available to the accused person because the evidence on record shows that there was no attack on his person by the deceased. The deceased was standing alone on the veranda engrossed on his phone. There was not even an attack that was imminent. Furthermore, the deceased was unarmed. It was not necessary for the accused to strike the deceased with a log and in the process split his skull. The severe strike with a log on the deceased's head cannot by any stretch of imagination be said to have been made to avert any form of danger to his person. It was a fallacy for the accused to even seek to hide behind this defence because his story is completely false. Because the very first requirement was not met, it becomes unnecessary for the court to discuss all the other requirements to sustain the defence of self-defence.

Legal intention is inferred from the circumstances of the case and all other available evidence to determine what the accused must have been thinking at the time of the offense. Based on the available evidence, it is clear that the accused intended to cause the death of the deceased or in the very 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. He used a lethal weapon to strike a vulnerable part of the deceased's body with mighty force. The deceased's skull was fractured.

Disposition

There is no dispute that there was animosity between the accused and the deceased prior to the incident. The accused's motive for killing the deceased stemmed from a desire to settle old scores and a feeling of being belittled by the deceased. On the day of the incident, the motive was reignited when the deceased made threats towards the accused. Our analysis suggests that during the five hours following the threats, the accused formulated a plan to attack the deceased. He chose to strike when no one was expecting it, taking advantage of the deceased's distraction while using his phone. The accused acted quickly and without restraint, ensuring that no one had the opportunity to intervene. The deceased was caught off guard and unaware of the accused's approach. The accused did not strike the deceased in self-defence. Ultimately the state managed to prove that the accused's version of events is false and in doing so managed to prove the accused's guilt beyond reasonable doubt. He is accordingly found guilty of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Reasons for sentence

In our endeavour to arrive at an appropriate sentence we considered all mitigating and aggravating factors submitted by Ms *Gapare* for the accused and Ms *Ngoma* for the State.

In mitigation, counsel for the accused submitted that the accused is 28 years old, has a wife and one child among other issues. She further added that because of his age the accused is a youthful first offender who acted out of immaturity and referred us to the case of *S vs Makuchete* HMA 10-18 in which the court stated that a person's self-control maybe reduced by their youthfulness. She also stated that the accused suffered emotional trauma through the threats that had been extended towards him by the deceased, 5 hours earlier and that he had shown remorse and contrition by compensating the deceased's family with a total of 11 cows and USD4 000. Counsel then urged the court to find that the murder was committed in extenuating circumstances and sentence the accused to a lesser sentence. She referred this court to several precedents amongst which is the case of *S v Hahlekiye* HH 260-17 which held that it is mitigatory where the accused has met the demands of the family as it shows contrition on the part of the deceased.

The above submissions are accurate when used in the appropriate context. However, it appears the accused and his counsel are unaware of the fact that sentences for murder just like the crime itself are now codified. See *Tafadzwa Mapfoche v The State* SC 84/21.

The initial step in the assessment of sentences in murder cases is for a court to make a determination of whether or not, the murder was committed in aggravating circumstances. For this purpose, the court is required to consider the factors enumerated in ss 47 (2) and (3) of the Code. Only if the court does not find that the murder was in aggravating circumstances will the general aspects in mitigation work in favour of the accused.

There is no doubt that this murder was premeditated as envisaged in s 47 (3) (a). From the moment the accused encountered the deceased at approximately 5pm that day he spent the following five hours actively seeking an opportunity to strike. He lingered near the shops where he knew the deceased would be and upon spotting him among the people present, he proceeded to discreetly monitor his activities from an inconspicuous location. This behaviour clearly indicates that he had premeditated the murder.

What also aggravates this crime is that this was a callous murder of a defenceless man without any provocation. The accused caused the death of the deceased by striking him with a wooden log one meter long and 15cm in diameter while he was on his phone and unaware of the accused's presence. He mercilessly bludgeoned him to death cracked and split his skull in the process. The savagery and barbarism of the attack was unmitigated. The accused gave the deceased no opportunity for survival as illustrated by the fact that the deceased immediately collapsed and started bleeding profusely from the head. The accused was determined to kill the deceased. He did not take heed of his own father in law's pleas to desist from his aggression towards the deceased. He had to be restrained by 4 men. It appears the accused vented his bottled anger on the deceased.

By his very actions a precious life was lost in circumstances where it could have been avoided. Whatever grudge he held against the deceased did not give the accused the right to take away a God given constitutionally provided for right to life. Section 48 of the Zimbabwean Constitution is instructive. It therefore goes without saying that sentences imposed for murder must send a clear message to the accused and would be offenders that the sanctity of human life should be held sacrosanct and that disputes should be resolved amicably. Anything other than this can promote anarchy and this court must guard against this.

Section 47(4) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides as follows:

“(4) A person convicted of murder shall be liable—
(a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
(b) in any other case to imprisonment for any definite period.”

From the above provision, the court’s hands are to a very large extent tied in relation to the sentence it can pass after a conviction for murder where it finds that the killing was committed in aggravating circumstances. In that case, the court only has three options namely to pass a sentence of death or imprisonment for life or some determinate prison term but which is not less than 20 years. *In casu*, the court found that the murder was committed in aggravating circumstances.

Accordingly, the accused is sentenced to **30 years imprisonment.**

*National Prosecuting Authority, State’s legal practitioners
D.V Gapare, accused’s legal practitioners*