

THE STATE
versus
GARIKAI CHIHURI
and
TINASHE HASTONE MPHAKA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26, 27, 28 JUNE, 29 AUGUST, 3 & 4 OCTOBER 2019

Assessors Mr Msengezi
 Mr Chimonyo

Criminal Trial

HM Muringgani, for the state
C Chengeta, for the 1st accused
Z Dumbura, for 2nd accused

TSANGA J: The deceased was fatally stabbed in a bar after he intervened to assist a woman who was being physically attacked by a group of bar revellers who included the two accused persons. The incident happened on the 23rd of October 2017 at Cam and Motor Bar Eiffel Flats Kadoma. Two accused persons Garikai Chihuri and Tinashe Hastone Mpaka were charged with his murder and both pled not guilty. After hearing the evidence and in the closing submissions the state argued that the first accused Garikai Chihuri should be convicted of public violence whilst it maintained that the finding against the second accused Hastone Mphaka be that of murder.

Five state witnesses gave oral evidence whilst the evidence of one witness Kedias Moyo was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He was the police officer who was called to the scene that night and had observed the body of the deceased lying in a pool of blood. The evidence of one Denson Msengi was expunged from the record.

For purposes of flow of the context of the events that night that culminated in the murder of the deceased, the evidence of the state witnesses will be dealt according to the

contribution to the events as a whole. We start with that of Yvonne Manhenga whose evidence gave context to the events that unfolded. We then examine that of her friend Esnath Suweli who witnessed all the events that night up to the murder. Then we deal with that of Fungayi Bakacheza who was inside the bar when he received the report of his nephew's death and what he observed thereafter. We then move on to the evidence of the police officers.

YVONNE MANHENGA

She was in the bar that night drinking beer in the company of her friend Esnath Suweli. The first accused had approached and greeted them and gone away. Upon his return he said he wanted sex with her for a short time. She refused. He kicked her friend. She restrained her friend who wanted to scold him. The first accused had gone back where he was drinking. This witness had then started dancing when the second accused who was in his company came to her and remarked on the way she was dancing. He had then enquired if she was a virgin. Annoyed she had gone to the first accused and asked him to restrain his friend. The first accused instead had then attempted to slap her but had been blocked by the second accused person. At that point the first accused person had gone outside and she had followed him to enquire why he wanted to slap her. She went back inside and as she was attempting to buy beer the first accused grabbed her by her clothes and dragged her saying he wanted to assault her. He was with the second accused, and one Tendai who is at large as well as others. They had assaulted her outside using mops and fists. At that stage, the deceased, Kuda Raisi had intervened and asked them why they were assaulting a woman. She had used that opportunity to slip between his legs and run away. She did not know what had happened to him thereafter as she had gone away with her boyfriend.

In cross examination by counsel of the first accused she said that the number of people who were attacking outside her were about 7. Some used their hands, others mops. She had been injured on her right leg in the fight against her outside. At the point that she was dragged outside her boyfriend one Kudakwashe Moyo had tried to assist her by extricating her from the group of people assaulting her but had been overpowered. She had retaliated the attack by the first accused by slapping him with her hands. At the time they were still inside before being dragged outside, she admitted to throwing a bottle at the first accused which missed him and hit the wall.

In responding to questions by counsel for the second accused she highlighted that the second accused who had initially stopped the first accused from slapping her had later been amongst those who dragged her and assaulted her outside with the first accused.

ESNATH SUWELI

She confirmed the above version of events concerning their encounter with the first accused. When he kicked her he said he wanted to know who she was and Yvonne her friend had indeed told him to stop what he was doing. She further confirmed that the first accused came to the dance floor wanting to slap Yvonne and that the second accused had indeed stopped him. He had come back after going outside and slapped her and it was at that point that she had taken a bottle and thrown it at him. The second accused had remarked that Yvonne was good at fighting. It was when they were going to get themselves more beers that Yvonne had been dragged outside and the group including the accused persons had attacked her. This witness had remarked that Yvonne was not violent but only wanted to know why they were slapping her. Yvonne had been dragged outside and it was at that point that this witness had called Yvonne's boyfriend Kudakwashe who was overpowered and pushed by the second accused. He had given up. She confirmed that outside the second accused and others attacked Yvonne with mops. She further confirmed that indeed the deceased had at that point asked the gang why they were attacking or assaulting a woman. At that point she had seen the second person produce a machete. She had instinctively called out to Yvonne that a machete had been produced and it was at that point that Yvonne had managed to duck between the deceased's legs and had gone away with her boyfriend.

She heard the deceased cry out as the second accused had struck him with the machete. The second accused had remarked in shona "tamupedzera" meaning we have dealt with him or finished him. He had also said he could not be taken advantage of by young people. He was holding a machete covered in blood. He was also covered in blood. He had gotten into a car together with the first accused and drove off. It was then that those present had gone to where the now deceased lay and found him already dead. The police were then called.

She further revealed that following the murder she had fled from Kadoma to Sanyati as the accused persons were always looking for Yvonne and herself. They mistook a certain woman for Yvonne and cut her with a machete.

In cross examination by counsel for first accused the following emerged. The machete had been produced at the point when the deceased intervened to ask why they were assaulting a woman. On why Yvonne had not seen the machete or spoken about it, her response that Yvonne was in the throes of an attack and her primary concern would have been getting away which she did. She had seen the attack as there was light where she and others were standing. She had seen the second accused deliver one blow to the ear. She had seen both the first and second accused approach the car there after together with one other of the seven. She had not seen the first accused attack the deceased but only the second accused. All this had happened at around 11 pm. After she saw the deceased being struck that is when she ran away inside the bar.

From the cross examination by counsel for the second accused the following emerged: That her statement to the police did not specifically mention that she had seen the second accused use the machete to strike the deceased. She said she had told them and rejected the suggestion that it was an afterthought. She did not know if the woman who was subsequently attacked had reported to the police save that she had come to tell them in the morning and that on that day her mother had given her money to go to Sanyati for her safety.

She further emphasised that she had gone into the bar to collect her phones after he had witnessed the attack on the deceased with the machete and it was then that the sales lady had said she should not go outside as it was clearly now very dangerous. She further clarified that the machete had been taken by the second accused from his trousers and that she had once seen him draw it from there in Chakari when the second accused assaulted her and her aunt. At that time he had assaulted her with a switch and her aunt with the flat side of the same machete. She said she had reported the incident in Chakari which happened about three years ago. At that time the accused had said he wanted to assault people. t

FUNGAYI BAKACHEZA

He told the court that he had been at the bar that night. The deceased was his nephew. He had initially gone outside to witness the commotion but had returned inside because he did not want to be involved. He had been playing snooker in the bar when his nephew's friend had come to tell him that that his nephew had been stabbed by the second accused, Hastone. He had observed both accused persons with blood and in particular the second accused had blood stained clothes and blood on his hands. He had gone home to call his father and brother who had then called the police.

TINASHE ZISENGWE

He was the police officer who arrested the second accused in Bindura. On the 1st of March 2018, he had received information to the effect that the second accused had committed a murder in Kadoma and was on the run. He had mobilised manpower and arrested the accused. On interviewing the accused, he denied ever staying in Kadoma. He denied the allegations of murder when his warned and cautioned statement was recorded. He also told him that his name was Tinashe Mupaka and specifically denied that his name was Hastone.

DAVID GAPARE

He was the Investigating Officer. He told the court that he had attended to the post mortem of the deceased at Harare Central hospital and that the post mortem of the deceased had revealed that he had died of excessive bleeding from a stab wound. The first accused had been arrested after being lured to come to the police station whilst the second accused Hastone had been on the run before being arrested in Bindura. He had also carried out some indications at the scene with the witnesses but the accused persons had refused to do indications. The accused had been charged on the testimony of the witnesses. His evidence on what the witnesses told him was virtually the same as they narrated to this court and need not be repeated.

In cross examination by counsel for first accused it emerged from the witness that the first accused had been lured to the police station on the 27th of October 2017, on the pretext that he did not have a case to answer. His employer had not told him that he had a case to answer. In other words, he did not hand himself to the police before that. He said they had looked for him prior to that and his employer had only seen him on the 27th reporting for work in a bid to take his belongings.

In cross examination by counsel for the second accused, it emerged that the deceased had a cut under he left ear and another cut on the right side of the neck. These were stab wounds which he said proved that the accused who was holding a machete had inflicted. He repeated that the second accused had been seen in action stabbing the deceased by Esnath Suweli. It further emerged that the second accused was not reachable after the murder and the witness he had tried to get the geographical location of the second accused from ECONET after the stabbing to no avail. He also described the two accused persons as having monster type minds in that they love violence. He further stated that a machete can be hidden and

produced in a flash. He also surmised that the accused had gone away with the weapon as it did not necessarily follow that he would have thrown it down.

THE FIRST ACCUSED'S TESTIMONY

He admitted to having assaulted Yvonne after she had pushed him and insulted him by saying miners are troublesome people. She had said this when he had tried to greet her. He denied approaching her for sex. He said after being restricted by Hastone the second accused, he had gone outside and thereafter driven home with his brother. He said he did not see the deceased and neither did he see him coming to rescue Yvonne as claimed.

In cross examination, he denied that a further scuffle had taken place after his attack on Yvonne. State counsel pointed out that he had not challenged her version that they had dragged her out when she was on the witness stand. He had also not challenged the assertion that her boyfriend had intervened at one time. He claimed not to have heard the witnesses who testified that when the deceased intervened, he had asked why they were assaulting a woman.

Whilst in his defence outline had said he would call a witness Joseph Chihuri to state that he was asleep on his car outside Cam and Motor Nite club on the evening of October 23rd October 2017, he did not call any witness.

THE SECOND ACCUSED'S TESTIMONY

He confirmed that the first accused had indeed slapped Yvonne and that he had intervened. He further stated that some men who were drinking with Yvonne then came and in the middle of attacking the first accused person that is when Yvonne had thrown a bottle. He said the first accused had gone outside and he had not seen where he had gone. According to him it was one Tendai, Sanyati and Master who thereafter engaged in a fight with the men who were with Yvonne who had a wanted to assault the first accused, Garikayi. He had tried to look for Garikayi but he was not in the vicinity. Materially, he told the court that the bar had to close because of the fighting and mayhem that was taking place. People had also had to go to their residences and that is how he had left the scene. He had not seen who had stabbed he deceased. He denied Yvonne's version that she had been assaulted outside by seven of them and said she had only been assaulted once by the first accused. If ever there was anything that had happened after that, he said he had not seen it. He had gone where he was staying. He had ended up in Bindura because there had been a break down at the mine

where he was working for about a week. He denied ever assaulting Esnath Suweli in Chakari though he said he did grow up in Chakari. He denied attacking a woman called Beauty as a warning to Esnath and Yvonne.

Whilst in his defence outline he had specifically mentioned the deceased by name as having intervened in the altercation between the first accused and Yvonne, in cross examination, he now claimed to have heard that name from the Investigation officer. He denied pushing Yvonne's boyfriend when he had tried to intervene but it was pointed out by the state that he had not disputed this evidence when it was put before the court. It was put to him that he had also not disputed that he made the statement "tamupedzera" or that his t-shirt had blood though he maintained that this had been disputed. He denied fleeing Kadoma on the basis that there was nothing to show that he was on the run.

Closing submissions

Against the backdrop of the above evidence, the state argued that the second accused faced a charge under s 47(1) (b) in that he had used a fatal weapon against the deceased which was not warranted realising that death would ensue. As regards the first accused the state argued that he should be convicted of public violence.

Counsel for the first accused argued that since Esnath said she had not seen the first accused attack the deceased the issue of blood on this t-shirt which the witness Bakacheza said he had seen should be discounted. He also argued that Bakacheza's evidence regarding seeing the first accused in vehicle at the material time after the murder should be discounted. In essence he maintained that the first accused had not been at the scene when the further violence erupted. As such his position was that he could not and should not be charged with public violence.

Second accused's counsel emphasised the point that Esnath the main witness had not mentioned the actual attack with the machete in her statement. He also said that she had a bone to chew with the second accused as she had also mentioned that the second accused had attacked Beauty following this incident. In essence, he said the second accused should be acquitted as it was not for the accused person to convince the court of his defence but for the state to prove its case beyond reasonable doubt which he said the state had not done. *S v Mupatsa* 2010 (1) ZLR at p259 and *S v Mapfumo* 1983(1) ZLR (SC) 250 at p253

Analysis of the evidence

Yvonne's evidence in our view was a straightforward account of the events of that night. We accept her evidence that outside the bar following her attack by the first accused inside, she was attacked by persons who included both the first accused and the second accused. The presence of these two accused person in the melee outside the bar was corroborated by Esnath Suweli and Fungayi Bakacheza.

As regards the first accused and his claim that he had disappeared from the scene immediately after he had been restrained from attacking Yvonne inside the bar, we dismiss this evidence for the following reasons. Yvonne gave her evidence very clearly that the first accused was among her attackers outside the bar and that in fact it was the first accused who had dragged her outside after their first altercation. She said she had sustained an injury to her leg in the outside assault and the record of the charge of assault against the first accused shows that the injury to the leg was mentioned in that matter. He must therefore been part of the crowd that was causing public violence outside. The second accused was clear that the bar had to be closed.

Regarding the first accused in terms of s 275 of the Criminal Code a person charged with a crime specified in the first column of the Fourth Schedule may be found guilty of a crime specified opposite thereto in the second column of the Fourth Schedule if such are the facts proved. His counsel argued that he could not be charged with the crime of public violence because he said a reading of the alternative verdicts under the fourth schedule of the Criminal code shows that the alternative charge of public violence is only applicable where a person had been charged with culpable homicide. The alternative verdicts under murder are listed as follows:

Fourth Schedule

47 Murder

(a) Infanticide;

(b) Culpable homicide;

(c) **Any crime of which a person might be convicted if he or she were charged**

with a crime specified in paragraph (a) or (b).

Now any crime for which a person may be convicted for culpable homicide are listed under the relevant section of the schedule as follows:

49 Culpable homicide

(a) Inciting suicide;

(b) Rape;

(c) **Public violence;**

(d) Unlawful termination of pregnancy;

- (e) Assault;
- (f) Threatening to commit murder;
- (g) Any crime of which a person might be convicted if he or she were charged with a crime specified in paragraphs (a) to (f).

In other words, if the accused is charged with murder but if this charge cannot stick he can still be found guilty of competent verdict which in this case includes any of those verdicts listed under the crime of culpable homicide. It does not mean he must have been found guilty of culpable homicide in order for the alternative verdicts to apply. What the provision means is that the competent verdicts for murder include those listed for culpable homicide. Public violence is therefore a competent verdict.

Now in terms of whether the facts against the first accused speak to public violence we turn to the relevant section of the criminal Code which provides as follows:

36 Public violence

- (1) Any person who, acting in concert with one or more other persons, forcibly and to a serious extent
- (a) disturbs the peace, security or order of the public or any section of the public; or
 - (b) invades the rights of other people;
- intending such disturbance or invasion or realising that there is a real risk or possibility that such disturbance or invasion may occur, shall be guilty of public violence and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both.

In our view we have no doubt that the first accused is guilty of public violence. Although he denied being present, he clearly was, the bar had to close. He clearly invaded the rights of other people who wanted to use the bar that night. The factors to be taken into account in determining whether a disturbance of peace or violation or invasion of rights of other persons is sufficiently serious to constitute the crime of public violence are listed as follows:

- (a) the nature and duration of the disturbance or invasion;
- (b) the motive of the persons involved in the disturbance or invasion;
- (c) whether the disturbance or invasion occurred in a public place or on private property;
- (d) whether or not the persons involved in the disturbance or invasion were armed and, if so, the nature of their weapons;
- (e) whether or not bodily injury or damage to property occurred in the course of or as a result of the disturbance or invasion;
- (f) whether or not there was an attack on the police or on other persons in lawful authority;
- (g) the manner in which the disturbance or invasion came to an end.

- (3) It shall be an aggravating circumstance if, in the course of or as a result of the public violence
- (a) there was an attack on the police or on other persons in lawful authority; or
 - (b) bodily injury or damage to property occurred; or
 - (c) The person who has been convicted of the crime instigated an attack on the police or other persons in Lawful authority or instigated the infliction of bodily injury or the causing of damage to property.

The violence itself we are told lasted a long time. The second accused put it at an hour. There motive was to deliberately assault other patrons and it occurred in a public setting. The bar had to ultimately closed and patrons had to go home because of the hooliganism that occurred. More importantly the first accused was the stimulus of the public violence at the bar that night. Even if privately owned bars are public spaces where every citizen who chooses to go there has a right to be. The crude attitude towards women who go to bars and the blatant harassment that often takes place there is clearly unacceptable. The attitude that women who frequent such public spaces as bars are there for men's sexual pleasures is an invasion of rights. In *S v Jeri* this same crude behaviour where women are seen as being for the taking just because they are in a bar was out rightly condemned. As in this case it ended up in an unnecessary murder. The resultant public violence in this instance had sadly only come to an end with the demise of the deceased who was in fact trying to stop the violence against a woman.

We have positively no doubt that the first accused is guilty of public violence as proved by the facts and accordingly return of guilty of public violence in terms of s 36 of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

We turn now to the evidence led against the second accused. Regarding the quality of Esnath Suweli's evidence as a prime witness of the actual murder our first observation is that the circumstances surrounding her opportunity to observe were clearly laid out by the factual evidence of Yvonne Manhenga. She testified as someone who had personal knowledge of what had happened from the beginning of the events of that night. As such, we would only be able to reject her evidence as unreliable if we, as triers of fact could not possibly believe what she said she saw given the totality of the evidence that unfolded that night. Her demeanour was candid throughout. There was no testimony that she was drunk and therefore we cannot say that her capacity to observe the events that night was defective in any way. She did not seek to enlarge facts. She was candid that at the material point of the attack on the deceased

she had on seen only the second accused and not the first accused strike him even though the first accused was among Yvonne's attackers.

It was argued that her past encounter with the second accused may have induced her to falsely testify about seeing him stabbing the deceased. In the same breath, those experience were said to be false. As regards her testimony in cross examination on the accused's previous attacks on women, it is not necessarily that they were false but that there were indeed no reports made. However, against the backdrop of the description of the accused's behaviour that night in joining in the fight against Yvonne, this speaks volumes about his attitude to being an alpha male.

Much was said by counsel for the second accused about the fact that when she gave her statement she had not specifically mentioned that she had seen him use the machete. Materially oral or written statements made by a witness are used to revive dormant memories and not as full accounts of everything that will have transpired. A witness is therefore not in court simply purpose of repeating what is written in a statement. This is not to say that a statement is not important but to recognise that the whole purpose of calling witnesses to personally give evidence is to accord them the opportunity to express their fullest recollection of the events that they witnessed. The purpose of recording a statement is to provide a formal framework for that testimony. Moreover, these statements as Reid Rowland notes, are often recorded by personnel who are not lawyers and who may not appreciate the significance of certain facts.

Materially, the issue of the machete itself was not a recent fabrication. It was a material averment at the time she gave her statement to the police. In this instance what the witness did was not to change her statement but to orally expand on her factual observations. In other words, the complaint is not that she changed her statement but that she should have recorded everything. In other words, the major basis for trying to discredit her credibility was that after mentioning the production of the machete by the second accused she did not mention that she saw him use it.

We have no doubt that her testimony flowed from start to finish. It was also not in dispute from the post mortem report that the accused had died as a result of stabbing with an object. As such there was no contradiction in her seeing the production of the machete and its subsequent use. The testimony in court gave a full picture of what happened. Even though the machete was not found, materially circumstantial evidence can create logical inferences. The

inference in this case is that the accused on producing the machete he had used it and gone with it.

We also have no reason to disbelieve Bakacheza's claim that he saw the first accused in the car when he went out after the attack. As regards his evidence that he saw blood on the second accused, we also have no reason to disbelieve his testimony that the reporter of his nephew's death had immediately mentioned that he had been attacked by the second accused.

It was in fact the second accused whose conscience we can say would be unlikely to be disturbed by the falsification of any evidence. From what was said by Police officer Tinashe Zisengwe he had denied ever living in Kadoma and yet he lived there. He had also denied at that time when he spoke to the officer that his name was Hastone and yet observably the witnesses and the first accused consistently referred to him during this trial as Hastone. This to us points to the fact that this was a name he was commonly known by. As for his claim that he was not on the run it boggles the mind why he would then have denied any association with having lived in Kadoma at the time he was arrested. Also, when IO gave evidence that his number had not been reachable soon after the commission of the offence, he had not disputed this fact. He was on the run because he knew he had committed an offence.

Whilst the second accused may have started off seemingly helpful to Yvonne when she was about to be attacked by the first accused he appears to have changed his stance to prove his masculinity to the group. More specifically it was him who had asked Yvonne if she was good at fighting men. Again, he escalated the violence when the deceased then challenged his version of masculinity by asking why he and his fellow gangsters were attacking a woman. In other words, the tempo became deadly when his masculinity was challenged. His mission at that point appears to have been to show the deceased that it was him who was not conforming to the accused person's version of masculinity hence the words "tamupedzera" or we have finished with him. Ultimately for the second accused his behaviour that night from the facts narrated suggests that his primary consideration was to display power over a woman and then power over another man.... inevitably a deadly mind-set.

When he produced and used the machete he clearly did not care what the consequences would be. We agree with the state that a verdict of murder in terms of s 47(1) (b) against the second accused is appropriate under the circumstances.

We accordingly find the accused guilty of murder in terms of s 47(1) (b) of the Criminal Code.

The first accused is a first offender and a family man. His lawyer argued that having been convicted of assault in the magistrate's court, he effectively served his sentence for assault and should not have to serve a sentence for public violence.

It is important to emphasise that in the magistrate's court the charge of assault that the first accused faced was against a specific individual who was not the deceased. He was merely fined \$30 and in default 30 days imprisonment. At no point did the charge or the trial speak to the issue of public violence which not only involved the complainant but others as well who included her boyfriend. That charge of assault in no way incorporated the overall context of public violence that ultimately led to the deceased's death. The first accused was in this court on a charge of murder and it is in context of that charge that the verdict of public violence was arrived at.

Even though the accused was acquitted of murder, it is a fact that this court found him to have been part of the group that caused mayhem at the bar that night. Materially, even after Yvonne departed from the scene, those participating in public violence who this court found to have included the first accused, had shifted their focus to the now deceased. The accused may not have been the one to produce and use the knife but he was certainly central to the public violence. That public violence is taken as a serious offence is borne out by case law.

In *S v Tawatwa & Ors* HH-62-93 the court highlighted that any participation whatever in public violence is very serious, and that the interests of the public far outweigh considerations of the individual accused. It matters not that only one person out of those committing the offence is convicted. The court imposed 3 years' imprisonment with half suspended. This was materially before the criminal code had come into play.

In *Samson Momberume & 9 Others v The State* HH 76-04 public violence erupted amongst two rival apostolic church factions. Property which included a coffin was destroyed. The accused were convicted of public violence and sentenced to 36 months imprisonment of which 10 months were suspended for 5 years on the usual conditions of good behaviour. A further 10 months imprisonment were suspended on condition of restitution since monetary value was attached to the property. The effective sentence of 16 months imprisonment was upheld on appeal.

Similarly in *Mangena and 5 Ors v The State* HB 22/05 the accused received a sentence of 48 months imprisonment of which 3 months imprisonment was suspended for 5

years on the usual conditions of good behaviour for public violence. The motive of the public violence was to “rescue” the wives, relatives and fellow villagers who had been lawfully arrested for poaching offences committed at the ranch. The complainants were carrying out their lawful duties of preserving and managing wild life and game at the time of the attack by the appellants. The appeal court set aside the original sentence and substituted it with one of 48 months imprisonment of which 24 months was suspended for 3 years on condition that the accused does not within that period commit an offence involving public violence. The court also observed that public violence strikes at the root of peaceful co-existence.

What distinguishes the nature of public violence in the above cases and that before this court is the fact that *in casu* there was a loss of human life even if ultimately this was at the hands of the second accused. The first accused was a key part of instigating that disorderly conduct as this court found.

In arriving at an appropriate sentence, materially as already stated the violence occurred in a public place; it had also been fairly prolonged. Those involved were armed with sticks and mops and a machete in the case of the second accused. The public violence had only come to an end when one of the accused fatally stabbed the deceased with a machete. The bar had to be closed. This kind of public violence in public places where others have a right to be should most certainly be frowned on. Public spaces need to be safe for all members of society to frequent. This is clearly not a case that calls for community service. It is certainly not a case which calls for a fine. The accused needs to learn that his antisocial conduct calls for stiff punishment and not a softly approach. The first accused is sentenced to six years imprisonment with two years suspended for five years on condition that the accused person does not during that commit a crime involving public violence to which he is sentenced to a term of imprisonment without the option of a fine. The effective term of imprisonment is four years.

The second accused person is equally a family man aged 34 years old. He has a two year old child and says his wife is due to give birth. In mitigation, it was said that he had not been found guilty of murder with actual intent having been convicted under s 47 (1) (b). Several cases were cited to illustrate more serious circumstances in those cases, hence the argument that the accused should not be excessively penalised. Examples cited included *S v Kasiko* HH 579/16 where the accused stabbed his ex-lover’s partner and was sentenced to 19 years. In *S v Wakeni* HH15/18 an accused man received a 22 year sentence after he killed his wife suspecting her of an affair. Against the backdrop of the sentencing in such cases, the

accused's lawyer prayed for a sentence in the region of 15 years. The state, on the other hand, emphasised the need to look at factual circumstances of the murder in terms of who, how, where, and why the deceased had been murdered. The fact that the deceased had been murdered in a public place was also said to be aggravating. The state proposed a sentence in the region of 25 years.

We agree that ultimately each case must be examined in context. The accused in this case was carrying a machete. This is not a weapon that one would expect to be carried by a person on a day to day basis. It is not a self-defence weapon by any chance. It is a dangerous weapon associated with thugs and bandits. It is a weapon that those who carry it, have the intention of using it to inflict maximum damage. He did not offer an explanation as to why he had a machete on his person in the first place. Instead right from the start his attitude was that he could get away with murder. The blows were aimed at a sensitive part of the body. Moreover, after using the machete the accused was found to have uttered some victory statements.

The accused is 34. He should have known better than to attack a person who was trying to stop wantonless aggression. Whilst the incident may have taken place at a bar and he like others had been drinking, it was never a central focus of this trial that he had done what he did because he was under the influence of alcohol or that he was so inebriated as to know what he was doing.

The accused took a life that was still in its prime in circumstance that show a total lack of respect for the life of others. A fifteen year sentence would make a mockery of the loss of that life given that the accused herein was a mature adult who should have exercised his restraint.

The accused is sentenced to 25 years in prison for the murder of the deceased.

Chengeta Law Chambers, 1st accused's legal practitioners
Magaya-Mandizvidza Legal Practitioners, 2nd accused's legal practitioners
National Prosecuting Authority, State's legal practitioners