

THE STATE
versus
SUCCESS CHAVHAKAIRA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16, 20, and 29 March 2017

Criminal trial

H M Muringani, for the state
G Mhlanga, for the accused

CHITAPI J: The accused is charged with one count of murder and another count of attempted murder as respectively defined in s 47 and s 189 as read with s 47 of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]. The indictment in count 1 alleged that on 4 February, 2008 and at Makalanga Farm, Mazowe, the accused acting with intent to kill unlawfully shot the deceased Innocent Numwitike with a 303 rifle on the back and chest causing injuries which resulted in the shot victim's death. In count 2 it is alleged that on the same date and place and using the same weapon as in count 1, the accused unlawfully attempted to kill Moreblessing Chinoripi by shooting him once on the left arm, his intention being to kill the complainant or realising the real possibility or risk that his conduct might cause death. The accused pleaded not guilty to both charges.

The accused elected to give a defence outline in which in respect of count 1, he pleaded that he accidentally shot the deceased in the course of executing his duties as a security guard at the farm in question. He alleged that around 8:00 pm on the night of 8 February, 2008, he was patrolling the farm where his duties were to guard against or prevent theft of crops and farm equipment including a water pump.

He came across the deceased in count 1 and the complainant in count 2 within the farm at the water pump situated area. He confronted the two persons whom he believed to be thieves. He

did not know them and they also failed to give him a reasonable explanation for their presence. He decided to shepherd them to the farm house.

He outlined that the two persons “bolted in flight” and he then fired a warning shot to make them stop and arrest both. When he fired the shot, he thought that he had fired the shot away from the fleeing suspects. However, because it was dark and the suspects were in flight he realised afterwards that he had shot one of them. He outlined further that when the deceased fell down after being shot, the complainant in count 2 turned back and charged at the accused. He threw an object at the accused but it missed him. In fear of being disarmed and the gun being turned against him, the accused then fired a second shot to ward off the imminent attack. It is this shot which hit the complainant on the arm and he ran away.

The accused’s defence in essence was therefore one of causing death by accident and self defence in respect of the first and second counts respectively. It followed from the defence outline that the *actus reus* was common cause in that the accused admitted that he shot the deceased and also fired the second shot which hit the complainant on his left arm. The task of the court is therefore to determine the accused’s state of mind or intention when he committed the admitted acts and consequences which resulted therefrom.

The prosecutor sought admissions of a number of pieces of evidence from the defence counsel in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The admissions were duly made and related to the following evidence:

- (a) Exhibit 1 – was the postmortem report on the examination of the deceased’s remains by Doctor Chimuka. The report shows that the deceased was 18 years old. The doctor observed two wounds on the deceased’s body being an anterior and posterior ones. They were the entry and exit wounds caused by the gunshot. The wounds showed the trajectory of the shot to have gone through the heart. The cause of death was given as penetrating chest trauma.
- (b) Exhibit 2 – was the medical report by the Doctor Mukungunungwa following his examination of the complainant in count 2, Moreblessing Chinoripi. The report was compiled on 5 February, 2008. He observed a gunshot wound on the mid shaft of the complainant’s forearm. The injury was described as severe with a possibility of permanent injury.

(c) The evidence of the following witnesses as set out in the summary of their evidence as per the state summary Annexure A, was admitted and will be set out in brief.

- (i) Joselin Andrigu – is the owner of Makalanga Farm where the shootings took place. She is the employer of the accused. On the fateful day she handed the accused the 303 rifle serial No. TV 1995 when he reported for duty. The rifle was loaded with three rounds of ammunition. She received a report of the shooting and proceeded to the scene where she observed the deceased who had been shot on his back and chest. She identified the fire-arm which she had given to the accused when he commenced duty.
- (ii) Rueben James is a resident of Makalanga Farm. He reported for duty and was supposed to relieve the accused. He proceeded to the fields and passed through the accused's quarters. He observed the firearm which had been abandoned outside the accused's quarters. He took possession of the firearm intending to hand it over to the accused who was not within the immediate vicinity of the witness. He then met up with police officers who had been summoned to attend the scene. He handed the firearm to the police. The accused was nowhere to be seen.
- (iii) Ranganai Tivenga resides at Safire Mbembe Farm within the Mazowe area. He was at home on the day of the shooting in this matter. The complainant in count 2 Moreblessing Chinoripi came to the witness's residence and made a report to the witness. He observed that the witness had a gunshot wound on his left arm. He drove the complainant in his car to the scene of the shooting. On arrival the witness observed the deceased lying in a pool of blood. The witness drove to the local station with the complainant where the complainant made a report.

In addition to the admitted evidence the state led oral evidence from the complainant in count 2. Moreblessing Chinoripi. Before dealing with his evidence, it is convenient to deal with evidence of another witness, Witness Munyaradzi Mabika whom the court was advised, was deceased. His evidence was admitted by consent. He was the attending police detail. He received the shooting report, attended the scene and deployed police details to guard and secure the corpse was as it at night. On the following morning he revisited the scene. He observed wounds on the

deceased's back and chest. He also recovered a spent bullet cartridge and the 303 rifle which was used by the accused. He went to the accused's residence and found it deserted. He arranged for the collection of the deceased's remains to Concession Hospital.

Reverting to the evidence of Moreblessing Chinoripi the complainant in count two, he gave evidence that he stayed at P.T.C complex in Mazowe. He repairs tyres and also operates a commuter vehicle. The deceased was his nephew and workmate. He testified that in the morning of 4 February, 2008, the accused came to his home stead purporting that he had 100 litres of diesel which he was selling. He introduced himself as one of the children of Mrs Mapanda. The Mapandas owned the farm where the deceased was shot. He gave out that Mr Mapanda had engaged some casual labourers who wanted payment and that this was reason why Mr Mapanda was selling 100 litres of diesel to raise funds to pay the casual labourers. It was agreed that the complainant would later in the day upon his return from Harare proceed to the Mapanda Farm (Makalanga Farm) and see the diesel.

Around 3 pm - 4 pm and after convincing his nephew, the deceased, to accompany him, the complainant proceeded to Makalanga farm via some unidentified bar. They found the accused at this bar and proceeded with him to Makalanga Farm. When the trio got to a turn off leading to the farm house, the accused said that he wanted to check on some farm workers in the fields. The complainant followed him leaving the deceased behind. After some distance and when they got to a bushy area, the accused asked the compliant to wait for him. The complainant decided to walk back to where the deceased had remained.

The complainant testified that he then saw the accused come towards them holding something. The complaint and the deceased continued to walk towards the homestead. The accused got to some 3 -4 meters to where they were. The complaint then just heard the sound of a gunshot. The deceased stumbled and bumped against the complaint's shoulder and fell down. The complainant said that he crouched and bent down to check on the deceased. He realised that the deceased had been shot on the chest. He then shouted at the accused that he had killed a person. The accused fired a second shot which grazed the complainant's left arm, hence the charge of attempted murder. The complainant said that he asked the accused whether he wanted to kill him. The accused responded by demanding for money. The complainant said that he

responded that they had no money but the accused continued to demand for money whilst pointing the firearm at the complainant.

The complainant said that in response to the demands for money, he inserted his hand into his pocket and pretended that he had gotten hold of money. He then stretched his hand towards the accused whilst advancing in the accused's direction. The accused kept retreating ordering the complainant to place the money on the ground. The accused turned round and started running away towards the direction in which the trio had travelled when coming to the farm. The accused after running for some distance stopped and loaded another bullet into his rifle. The complainant realised that the accused wanted to kill him and he took flight running away past where the deceased lay. The accused was shouting at the complainant to stop. The complainant did not stop. He however felt some wetness on his left lower arm and realised that he had been shot or grazed by a bullet. He continued running and reached the next farm where he made a report to the farm owner who drove him back to the scene in his vehicle and later to the police station to make a report.

Asked by the prosecutor to describe the firearm, the complainant said that it was a long rifle almost 1 metre in length. He described the area where the shooting took place as a long narrow road used by tractors going to the fields. There are trees on either side of the narrow road. He denied that the deceased and him were loitering on the farm. He also denied that he ever attacked the accused.

Under cross examination the complainant said that Makalanga Farm was about 15 kilometers from the P.T.C Mazowe complex where he resided and that there were about 5 farms in between. He agreed that he had never met the accused before the morning of 4 February, 2008. He said that the accused had said that he got the complainant's name from people at Total Service Station. He agreed to discuss the diesel issue because diesel which was scarce could be found on farms. When asked why he would travel all the distance with a stranger, the complainant responded that he believed the accused's story that Mr Mapanda the owner of the diesel wanted to raise money to pay casual labourers who had weeded his field. He also said that things were very tough in 2008 and a person could walk long distances to get a source of living. Asked if he was not afraid to be defrauded, he responded that he was interested in the diesel as it would afford him a source of living by reselling it. He also believed that he would transact not just with

the accused but with Mr and Mrs Mapanda as well. He did not carry any money on him because he wanted to first see the diesel and negotiate the price with Mr and Mrs Mapanda. If agreement was reached, he would then return to Mazowe, collect the money and drive to Makalanga Farm to pay for and collect the diesel.

He was asked whether there were any workers in the fields at the farm and he said that there were none. When it was put to him that the accused only commenced duty at 5:30 pm, he responded that at that time the accused was with him and the deceased. He said that when the accused rejoined them, now armed, one could see 100 metres away. The accused just shot at the complainant and the deceased as the three walked in a single file with the complainant in front, the deceased in between and the accused bringing the rear. He denied that the accused approached them and ordered them to go to the farm house because he believed that he had apprehended thieves. When it was put to him that the accused fired the rifle because they were fleeing against his orders to stop, the complainant denied this and said that the accused had he intended to stop them from fleeing should have fired a warning shot in the air or to the ground. He was asked why if the accused had intended to rob them of money, he did not simply threaten them and demand money. He responded that he was surprised as well because the accused just shot them.

The complainant when asked how the accused shot at them responded that the first shot was direct and so was the second one. He said that he survived or was not hit by the second shot because he was in a crouching position holding up the deceased who had fallen down after being shot. Asked whether he sought to confront the accused and wrestle away his rifle, the complainant responded that he wanted to do so because the accused had killed someone. He denied that the accused was under attack when he discharged the rifle. He denied that him and the deceased were already at Makalanga farm when the accused approached them. The complainant denied that his presence and that of the deceased did not have anything to do with diesel nor that they were thieves because the accused was in their company.

In re-examination the complainant said that when the accused got into the bushes and asked him to wait, he was gone for 5 – 10 minutes. He said that the accused fired two shots and that the same shot which struck the deceased also hit him because the second shot missed him since he was in a crouched position. In respect of what happened when the accused reloaded the

third shot as per his evidence, he said that the rifle failed to discharge. On questions by the court on how much money he had, the complainant said he only had some trillions enough to buy two cokes. Asked whether the accused had told him the cost of the diesel, the complainant responded that some figure had been mentioned but he did not recall it. Asked whether the transaction was going to be concluded by the accused or the farm owner, the complainant responded that the farm owner was going to conclude the transaction. The state closed its case.

The accused gave evidence on oath. He said that he had only been employed as a farm guard for a week and some days when the incident took place. He did not receive any practical training on the use of a fire-arm but theoretical knowledge only at Centra College. His working hours on the fateful day were 6.00pm – 6.00am. He collected the fire – arm from Joselyn Andrigu around 5:30pm. He proceeded to the fields where there was a small hut occupied by some old man. The old man would guard the fields for monkeys and other animals during the day. The accused said that he then warmed himself by the fire and would occasionally do his rounds.

In the evening around 8:00pm the accused in doing his rounds went to the edge of the fields where there was a river and that is also the place where an electrical water-pump was installed. He testified that he then saw two persons seated who as is now common cause are the complainant and the deceased. There is only one road from the fields to where the two were seated. In other words there was no through road. He went towards where the persons were and the persons stood up. The accused ordered them to sit down. The deceased sat down but the complainant did not. He asked the persons for their names, where they stayed and what they wanted. The accused said that he was not satisfied by the answers which they gave to his questions as they did not tell their names in full nor give details of where they stayed. He then ordered them to come with him to the farm house where there was light and also to meet with the farm owner so that they would reveal their identities and get to know each other better.

The accused stated that as he shepherded the deceased and the complainant in the direction of the farm house they walked uphill for about 70 metres. On reaching the intersection of the road they were moving on and old Mazowe road, the deceased took to his heels and the complainant followed suit. The accused called on the two to stop. He cocked his rifle and fired a shot in the direction in which the two were fleeing. He said that he thought that he had fired

sideways of their line of flight. When he fired the shot he was 25 – 30 metres from the escapees. He did not warn them that he would shoot but only shouted at them to stop. When he discharged the shot, he was running after them and thought that the shot would go sideways of their direction. Asked by his defence counsel as to why he did not shoot in the air or to the ground, the accused said that he assumed that the shot or bullet would go sideways. He then saw one of the escapees fall down and cry out. At the same time the accused saw the complainant turn, running towards him. He shouted at him to stop or he would shoot him but he did not stop but continued to advance towards the accused past the deceased who lay on the ground. The complainant threw something in the direction of the accused and it missed him. He did not see what it was. The complainant then asked the accused to forgive him and offered to pay money. The accused did not respond to the offer and apology but ordered the complainant to sit down. The complainant however continued to advance towards the accused and the accused discharged another shot which then hit the complainant on his hand.

When asked why he discharged the second shot, the accused said that he thought that the accused wanted to disarm him. After the accused shot the complainant, the complainant turned round and started running away again. The accused ordered him to stop or he would shoot him but he continued running. The complainant escaped. The accused then went to where the deceased had fallen down and noted that he was still. He realized that he had killed him. He did not touch him to ascertain his condition. He proceeded to the water pump spot and saw that nothing had been disturbed.

He testified that he was greatly troubled by the thought of having killed a person. He did not report to the farm owner or seek help. He went to his quarters where his wife and sister in law were. He did not report the incident. He decided to just wander into the bushes, find poison to ingest and die. He just discarded the rifle outside his quarters. He denied the complainants' account of events that he lured the complainant to the farm and tried to rob the complainant and the deceased.

The prosecutor concentrated his cross examination on the failure by the accused to take precautionary steps to avoid shooting the complainant and the deceased. He asked the accused as to whether he had fired a warning shot. The accused responded that he fired sideways of the escapees and considered this to be a warning shot. He was asked as to what threat the duo posed

since they were just seated when he saw them. He responded that they wanted to steal cables or the water pump. He said that he wanted to take the duo to the farm house for interrogation. The prosecutor asked the accused as to what he was protecting by firing the rifle since the duo was running away and the accused said that he wanted to get them to the farm house for verifications. When it was put to him that he acted negligently in discharging the fire – arm without taking precautionary measures, the accused responded, “I can’t dispute that but what I wanted was to stop them from running away.” The defence closed its case.

In his address, the prosecutor properly in the view of the court submitted that the account of events given by the accused as to what transpired was more probable and believable than that given by the complainant. He submitted that the diesel story was difficult to believe and not plausible. For example, there were no prices agreed nor the identification of exactly where the diesel was. In the view of the court it was highly unlikely that the complainant and his nephew would have set forth on a 15 kilometer journey without any indication of what the diesel was costing. The court also found it unbelievable that the complainant would just have embarked on the journey with an unknown person who had not identified himself even by producing his identity card to show who he was. The complainant should have been expected to even phone the owner of the diesel and confirm its availability and price. The complainant presented himself to the court as not being a simpleton and exuded confidence when speaking. He certainly was a sophisticated person who even knew about rifles and tried to disarm the accused. The court concluded that the diesel story was a cooked up story.

The probabilities therefore favoured the accused’s account of events that he came upon the deceased and the complainant at the farm. Their mission was not known but would appear to have been sinister even though they are said to have been seated when first seen by the accused. The accused was well within his rights to want to know the identities of the complainant and the deceased as well as their mission. He acted reasonably in seeking to lead or shepherd them to the farm house where there was light so that the duo could explain their presence at the farm at night. The court will accept that the duo attempted to escape. Such a finding is consistent with the surrounding facts and circumstances of the shooting.

The issue for the court to decide in whether or not the accused’s conduct was excusable on the basis that he acted in defence of property. The requirements for the defence are codified

under ss 257 and 258 and 259 of the Criminal Law Codification & Reform Act. The sections provide as follows:

“257 Requirements for defence of property to be complete defence

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

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

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

(3) In determining whether or not any means used by a person to avert an unlawful attack were reasonable, or whether or not any harm or injury caused to an attacker was proportionate to that liable to be caused by an unlawful attack, a court shall have regard to the nature of the property which the person was trying to protect and its value to him or her.

258 Killing in defence of property

A person accused of a crime involving the killing of another person shall not be entitled to rely upon a defence in terms of this Part unless-

- (a) the accused resorted to killing after taking all other possible steps to protect the property concerned; and
- (b) the property concerned could not have been defended by any means except by killing; and
- (c) the property concerned was of vital importance to the accused; and
- (d) the accused 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.

259 When defence of property partial defence to murder

If a person accused of murder was defending his or her or another person’s property against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements specified in sections *two hundred and fifty-seven* and *two hundred and fifty-eight* are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.”

The facts of the case as accepted by the court left the court in no doubt that the accused person acted precipitately and negligently. There was no proven imminent danger to the property

which he was guarding. The deceased and the complainant did not pose any danger to either the accused or the property when he first saw them. They were seated. There was no evidence led to show that the accused could have suffered any stresses or entertained any fear of the duo. In fact the duo was not armed. The accused therefore had control of the situation. He was armed with a rifle. Whilst admittedly the accused had a duty to perform, he was only justified to use force if the property he was guarding was under threat or attack and that he could not defend it otherwise than by killing or shooting the trespassers. The accused cannot be said under the circumstances to have been defending the property because no property had been subjected to interference. The accused by his own admission intended to interrogate the duo. There was really no justification to insist on arresting them at the time they fled. The accused could just have, had he intended to scare them from ever coming back, fired into the air and made sure that they took flight.

The defence counsel in his closing submissions suggested that the accused's conduct fell to be excused under s 42 (1) of the Criminal Procedure & Evidence, [*Chapter 9:07*]. The contention does not hold sway. Although the law allows owners, occupiers or people in charge of property to effect an arrest in terms of s 29 of the Criminal Procedure & Evidence Act, the powers to arrest is subject to the rider that the person sought to be arrested must have been found in the process of committing an offence. In terms of s 30 a private person may arrest any person on reasonable suspicion that such person has committed a first schedule offence. The duo whom the accused sought to arrest were not found in the process of committing any offence. Therefore s 29 aforesaid did not come into play. The accused did not have any grounds to suspect that the duo had committed a first schedule offence.

Section 42 itself places a very onerous burden upon a person seeking to arrest another person who resists or attempts to flee from arrest. The section reads as follows:

- “42. Resisting arrest
(1) If any person who is authorised or required under this Act or any other reenactment to arrest or assist in arresting another person, attempt to make the arrest and the person whose arrest is attempted resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the person concerned cannot be arrested without the use of force, the person attempting the arrest may, in order to effect the arrest, use such force as may be reasonably justifiable and proportionate in the circumstances to overcome the resistance or prevent the person concerned from fleeing:

Provided that the person attempting the arrest is justified in terms of this section in using force against the person concerned only if the person sought to be arrested was

committing or had committed, or was suspected of having committed an offence referred to in the First Schedule, and the person attempting the arrest believes on reasonable grounds that-

- (a) the force is immediately necessary for the purposes of protecting the person attempting the arrest, any person lawfully assisting the person attempting the arrest or any other person from imminent or future death or grievous bodily harm; or
 - (b) there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed, or
 - (c) the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.
- (2) For the avoidance of doubt it is declared that no use of lethal force for the purposes of subsection (1) shall be lawful unless there is strict compliance with the conditions specified therein.”

As evident from ss 2 of the s 42, the use of lethal force shall not be lawful unless there is strict compliance with the requirements set out in the proviso of s 42 (1). Section 42 was substituted by s 14 of the Criminal Procedure & Evidence Amendment Act No. 2 of 2016. The strict conditions placed by the legislature were intended to give efficacy to the constitutional fundamentals regarding the right to life and liberty as enshrined in ss 48 and 49 of the Constitution of Zimbabwe (2013). Without seeking to engage in a discourse on the interpretation of s 42, what appears to emerge from its provisions is that the use of force will only ground an excuse in exceptional circumstances involving a danger to life or bodily integrity which the person on whom force is to be applied when he resists arrest, may likely cause. In *casu*, the complainant and the deceased did not fall into the class of persons whose behaviour called for or justified the use of force. They had not committed any offence nor were they committing an offence. Their presence at the farm could admittedly have been suspicious but whatever suspicion the accused person entertained at least from his evidence or at best by a reasonable test standard did not justify the use of force by the accused to stop their flight. Section 42 does not therefore avail a defence to the accused in the circumstances of this case.

The court must determine whether the accused is guilty of murder on the first count as charged. The evidence and circumstances of the case did not support this finding. The accused did not form an intention to kill the deceased or the complainant. Had this been his averred goal, he could have just shot them when he first saw them seated. Equally the evidence did not support a finding that the accused realized a real risk or possibility that death could result from his

conduct and continued to engage in such conduct. The accused's conduct was spontaneous. He was not involved in a conduct or activity which he continued in. The accused person engaged in conduct envisaged in s 49 (a) of the Criminal Law (Codification & Reform) Act, that is to say, he caused the death of the deceased negligently failing to realize that death may result from his conduct. The accused just shot in the direction of flight of the deceased and the complainant without taking time to aim his trajectory line outside the line of flight of the deceased and complainant. It mattered not that he ought to have fired into the air or the ground. What mattered was that he ought to have ensured that he did not aim the shot in the direction of flight of the fleeing due. The accused acted somewhat overzealously in discharging the fire-arm and hence negligently. See *S v Mhomho* 2007 (1) ZLR 48 (S). The accused cannot be said to have subjectively been aware of the existence of the possibility or risk of his conduct causing death and was reckless as to whether his conduct resulted in the consequence of death. The court considered the provisions of s 15 of the Criminal Law (Codification & Reform) Act which define the two components which constitute "realization of real risk or possibility" as an element of an offence and was satisfied that the accused's conduct did not satisfy the definition. In the result the appropriate verdict is that the accused is in count 1 found guilty of culpable homicide as defined in s 49 (a) of the Criminal Law (Codification & Reform) Act.

With respect to count 2, the accused raised self-defence to justify his action. The complainant testified that the same bullet which struck the deceased is the same one which grazed his arm. The accused testified that the complainant was shot by the second bullet which he fired when the complainant continued to advance towards him and he thought that the complainant wanted to attack him. The court did not get the benefit of any expert evidence as to whether the same bullet which struck the deceased or a subsequent shot is the one which struck the complainant. The accused himself testified that it was after he fired the second shot that he noticed the complainant to turn back and run away. The accused's account presented itself as more probable. The court has already indicated that where there was a conflict of facts, it would prefer the evidence of the accused to that of the complainant. The accused was the more impressive of the two and did not distance himself from involvement in the shooting and what he did.

The accused in firing the rifle for the second time testified that he intended to ward off an imminent attack on him by the complainant. The complainant agreed that after the accused had fired the first shot which hit the deceased he turned against the accused with the intention to disarm him. He said that he tried to hire him with an offer of money and extended his hand as if to hand the accused some money. The evidence and probabilities support the accused's version that he entertained a fear of being attacked and disarmed by the complainant. The question is whether the accused acted in self-defence. The requirements of self-defence are set out in ss 253-255 of the Criminal Law (Codification & Reform) Act which provide as follows:

“253 Requirements for defence of person to be complete defence

- (1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did nor omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if –
- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
 - (b) his or her conduct was necessary to avert the unlawful and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he she could not otherwise escape from or avert the attack, and
 - (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
 - (d) any harm or injury caused by his or her conduct –
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
- (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may been operating on his or her mind.

254 When defence of person partial defence to murder

If a person accused of murder was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything that is an essential element of the crime, he or she shall be guilty of culpable homicide if all the requirements for defence of person specified in section two hundred and fifty-three are satisfied in the case except that the means he or she used to avert the unlawful attack were not reasonable in all the circumstances.

255 Mistaken belief in relation to defence of person

If a person genuinely and on reasonable grounds, but mistakenly, believes that he or she is defending himself or herself or another person against an unlawful attack, he or she be entitled to a complete or partial defence in terms of this Part to any criminal charge in all respects as if his or her belief were in fact correct.”

The accused testified that when the complainant advanced towards him, he shouted at him to sit down and warned him that he would shout. The complainant was not deterred. It

would be to take an arm chair approach to hold that the accused should have taken flight. He was faced by a person who fully knew that the accused was armed but nonetheless continued to advance towards him. The accused had to defend himself and his conduct was reasonable in the circumstances. He fired the only weapon he had to avert the imminent attack. He could not have fired into the air or ground in such circumstances as the accused person found himself in. In the view of the court, the accused acted reasonably in all the circumstances and is therefore excused from blame and liability. A verdict of not guilty is returned in count 2.

SENTENCE

The accused was convicted of culpable homicide committed in 2008. The sentence for culpable homicide is prescribed in s 49 of the Criminal Law (Codification & Reform) Act as a sentence of “imprisonment for life or any shorter period or a fine up to or exceeding level 14 or both”. The penalty provision was amended by s 9 of Part XX of the General Laws Amendment Act No 3 by the deletion of “any shorter period” and the substitution of “or any definite period of imprisonment”. The amendment does not however affect the assessment of sentence in this case because it does not operate retrospectively.

In assessing sentence, the court will seek to strike a balance between the seriousness of the offence, the offender and the interests of society. What the sentence should always bear in mind in cases of culpable homicide is not so much the result of the negligent conduct then the degree of negligence which is the extent of deviation of the accused’s conduct from reasonable societal standards. Death is the end result which gives rise to a charge of culpable homicide and should therefore not blind the fact that death will inevitably have occurred accidentally without beingor intended.

The court made a finding that the accused acted overzealously and precipitately without caring to appreciate he could hit the deceased when he discharged the fire-arm in the general direction in which the deceased had fled without checking or aiming off target after identifying the precise position of his target. In a manner of speaking the accused’s actions were reckless and led to grave consequences. Even though the accused may have believed that the deceased had trespassed as provided in s 132 of the Criminal Law (Codification & Reform) Act the

circumstances of the case did not warrant the use of force as was resorted to by the accused person.

Persons who take charge of a fire-arm which is a lethal weapon are expected to exercise a high degree of care and diligence in the use of the weapon because it kills. The accused was said to have been of little education, having done grade seven level. He was then 26 years old and a first offender. He did not receive practical training in the use of the fire-arm. However, he did not reveal his inadequacies to the employer maybe in fear that he could have missed on a chance of employment. He should have asked to be trained in the use of the fire-arm. The risk which he took in taking charge of the fire-arm without adequate practical training back fired on him and resulted in grave consequences.

It was not disputed that he was so shocked by the result of his actions that he decided to run away instead of facing up to the consequences of his conduct. This behaviour does not place him in good standing with the court and the society. The fact of his having run away could have been understood had he shown up after a while and after reflecting on his misdeeds. He went into hiding until arrested by chance when he had been carded as a wanted person. In short the accused was on the run for 5 years until arrested for a different offence. It was then that he was then charged for the present case. The submission that the accused lived with the trauma of his misdeed since 2008 cannot be justified on the facts. He decided to be a fugitive from justice. He cannot invoke delay in the prosecution of the case because he did not make himself available.

It is a factor of aggravation that he ran away from his misdeed. He cannot plead remorse and contrition. His attempt to profer a defence which has no substance was not consistent with being contrite. He clearly was taking a long short by seeking to justify his conduct because his actions clearly manifested negligence at its worst hence the finding of recklessness.

The accused has been in custody since 2013. However he has been serving for the offence for which he was convicted which is not the present one. Despite the fact that he has been serving for a different offence, it remains a fact that he has been in prison and the retributive and reformative aspects of punishment are being served. One cannot separate these aspects and hold that they restart with the sentence which the court will impose.

The State has submitted that this is a rare case in which the accused shot the deceased when no offence had been committed. It is arguable whether or not the deceased and his

companion had not committed an offence. The issue of the commission of the offence was not really ventilated. The law recognizes the offence of criminal trespass as defined in s 132 of the Criminal Law (Codification & Reform) Act. The court made a finding that the presence of the deceased and his companion was sinister and as accepted by the State dismissed the explanation that the accused had hired them to his workplace to sell diesel to them which the accused's employer was allegedly offering for sale.

The accused is a family person, married with 2 minor children and is the bread winner. The circumstances of the killing were not wanton but arose during a discharge of duty where the accused acted with too much real and decided to show that might was right and did so with reckless abandon.

The State counsel has submitted various case authorities where sentences of up to 12 years with part suspended were imposed notably by the Bulawayo High Court. The circumstances of those cases do not compare with the present one. In *casu*, had the accused owned up to his misdeed and not become a fugitive, the delay in the prosecution of the case would have justified the imposition of a wholly suspended sentence. However, his escape from the scene and continued liberation did not endear him to the court. Coupled with his conduct was the high degree of negligence which the court has ruled to amount to recklessness. The accused's legal practitioner suggested that if the court was not inclined to impose a non-custodial sentence, then a sentence in the region of 2 years effective would meet the justice of the case. The court agrees.

Before sentencing the accused person, the court would like to observe and acknowledge the effort put by the accused's *pro-deo* counsel Mr *Mhlanga* in assisting the court and the accused. It is not very usual to find counsel acting *pro-deo* who devotes time and research to defend an accused. Most counsel adopt a perfunctory approach in handling *pro-deo* briefs.

Mr *Mhlanga*'s approach was therefore refreshing and it was noted that he painstakingly put forward the accused's defence and conceded when it was obvious that his submissions did not find favour with the court. This is as it should be.

Having ventilated the reasons for sentence, the sentence of the court is as follows:

"The accused is sentenced to 5 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition that the accused shall not during that period commit any offence involving the negligent killing of another human being for which he is imprisoned without the option of a fine. Effective sentence is therefore 2 years imprisonment."

Chihambakwe, Mutizwa & Partners, accused's legal practitioners
Prosecutor General's Office, state's legal practitioners