

THE STATE
versus
TINASHE MBEWE
and
JOSEPH MASIYE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17, 18, 19 & 20 October 2016 & 12 May 2017

Assessors: 1. Mr Shenje
2. Mr Kunaka

Criminal trial

Miss *N. Mazvimbakupa* for the State
B. Chikowero for the first Accused
N. Chikowore for second Accused

ZHOU J: The two accused persons appeared before this court facing a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations against them are that on 2 November 2015 and at Kuwadzana Shopping Centre, Bantek, the two accused persons, one or both of them unlawfully and with intent to kill, murdered the now deceased Perfect Matenda or realizing that there was a real risk or possibility that death might result stabbed the deceased with an okapi knife under the right armpit, thereby causing injuries from which the deceased died. Both accused persons pleaded not guilty to the charge.

At the close of the case for the prosecution the second accused Joseph Masiye was acquitted in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], on the basis that there was no evidence that he had committed the offence charged in the indictment or any other offence of which he might be convicted thereon. All the witnesses who testified for

the State did not give evidence that linked the second accused person to the offence, as illustrated in the summaries of the evidence given below.

The State relied on evidence from eight witnesses. Six of those witnesses, namely, Lynnet Mapiki, Erick Jamhu, Tinashe Nyauswa, Ebrahim Cheziri, Simon Makosa and Nyasha Negato gave *viva voce* evidence. The evidence of two other witnesses, namely, Dr Kudzai Makova and Simbarashe Chima, was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Dr Kudzai Makova is the Government Medical Officer who certified the deceased dead on 2 November 2015. On 3 November 2015 he undertook the postmortem examination of the remains of the deceased at Banket District Hospital and compiled a report in which he stated his observations and conclusions. The post-mortem report prepared by Dr Kudzai Makova gave the cause of death as “hemorrhagic shock secondary to bleeding from axillary vessels”. He stated in the post-mortem report that upon his examination of the deceased’s body he observed an extensive right axillary stab wound with severing of axillary vessels. This means that there was a stab wound which showed that the axillary vessels had been severed. The stab wound was in the right armpit. The report also shows that the doctor observed a left occipital scalp laceration and that the deceased’s clothes were drenched in blood.

The first witness to testify was Lynnet Mapiki who is seventeen years old. She is doing Form Four. In addition, she is a member of the Zimbabwe Republic Police’s Junior Cops which, in her understanding is an organization which educates them on good behavior and awareness of one’s surroundings. She did not know the deceased during his life. She knew the first accused person because she had seen him previously as he resided at a house close to the house where the witness’s classmates and friends resided. She also knew the first accused’s first name, Tinashe. As for the second accused, her evidence was that she had only heard about him but had not seen him. Her evidence was that she knew that the first accused is the one who killed the deceased. On the day in question she was left by her mother attending to the market stall around 10 o’clock in the evening. It was then that she saw the first accused person being pursued by nine persons. Some of those persons who were chasing after the first accused were throwing bricks. The accused person was running. Among the persons who were pursuing the first accused she recognized Tinashe Nyauswa and Erick Jamhu who also testified in this matter. She knew some

of those persons by only seeing them but did not know their names. There was another person who was also being chased together with the accused but she did not recognize that person. The witness stated that the accused person later returned to the shops. He was again chased by the same group that had previously chased him. This time around the deceased person was the one in front of the other persons who were pursuing the accused. The persons who were chasing after the accused person were drunk, according to the witness. They were following from a distance of about 48 metres behind the deceased, walking. Some of them were carrying bottles of beer. The deceased was also carrying a bottle of beer. The witness stated that the first accused person came and stood in front of their market stall. The deceased approached the first accused person intending to question and get hold of him. At that time the first accused produced a knife and stabbed the deceased on the left side. The deceased retreated and then fell to the ground. The accused person then ran away. The members of the deceased's group pursued the first accused but failed to catch him. One Chimera who came to assist was assaulted by members of the deceased's group who accused him of knowing the whereabouts of the first accused. The deceased was lying on the ground as motorists who came by refused to assist by providing transport. Eventually the deceased was conveyed from the scene by a person who was driving a white Toyota motor vehicle. The witness stated that the place where the events she described happened was illuminated by lights from the nearby shops and the light which was on her stall. During cross-examination she confirmed that the first accused had threatened that if the deceased and his colleagues continued to chase him he would stab them. She also confirmed that before he was stabbed the deceased had attempted to apprehend the deceased by grabbing him by the collar.

The second witness, Eric Jamhu, stated that he knew both accused persons. He met the first accused person at the market place on the evening in question at about 7 o'clock. The first accused person was assaulting a young man when the witness confronted him about the assault. The first accused did not accept the interference by the witness hence the two of them got involved in a scuffle. The first accused picked a stone and struck the witness. The accused ran away after striking the witness with a stone. The witness proceeded to a nearby bar where he narrated to his colleagues, the deceased, Ebrahim Cheziri and Tinashe Nyauswa what had happened between him and the first accused. The deceased was his workmate. About fifteen

minutes later the two accused persons came into the bar and pointed in the direction of the witness and his colleagues. The deceased suggested that they have a discussion with the accused persons in order to reach an understanding on the misunderstanding that had taken place earlier on. When they got out a fight ensued and the accused persons ran away with the deceased, the witness and his colleagues following behind. He was about 5 metres behind the deceased. He noticed that the deceased had stopped chasing the accused, and was returning towards him, bleeding. He did not see how the wound was inflicted. He stated that the second accused was following behind him together with some other persons. He assisted in trying to bandage the wound on the deceased person and arranging transport for the deceased to be taken to hospital. During cross-examination the witness denied that he and his colleagues had thrown bricks at the first accused. When he was asked in cross-examination about the assault upon Chimera the witness stated that Chimera was only apprehended by the other persons not himself, and taken to the police so that he would disclose the whereabouts of the first accused. The witness stated that he was drunk when he and his colleagues left the bar chasing the first accused person.

The third witness for the prosecution was Tinashe Nyauswa. He stated that he saw the two accused persons when they entered into the night club. He observed that the two accused persons had a misunderstanding with the deceased and the second witness. He saw the accused persons fighting with Joseph, Perfect(the deceased) and Eric Jamhu. They were throwing stones at each other. The accused persons started to run away. He started to chase after the second accused person. The deceased was chasing the first accused. He passed the deceased who was standing facing downwards. He stopped after the first accused had threatened him. When he retreated he noticed that the deceased had collapsed. During cross-examination he stated that he witnessed Eric Jamhu being involved in a fight with the accused person from the time they were inside the night club. He was standing by the door trying to get inside. The first accused and Eric Jamhu bumped into him as they were chasing each other and the witness was entering the nightclub. He also observed the fight in which the accused persons fought the deceased and Eric outside the night club. The witness stated that he was drunk at the time that the events which he narrated took place. On being questioned under cross-examination as to where the second accused was, the witness stated that he saw the second accused together with the first accused and another person when they entered the bar and pointed to him and his colleagues. The

evidence of this witness was contradictory. He changed his version several times. Firstly, he contradicted Erick Jamhu by stating that the latter was involved in the fight with the accused persons. In his evidence-in-chief- he stated that he was at the door trying to enter into the night club when he first observed the fight between the deceased and Eric Jamhu on the one hand and the accused persons on the other. Later on he stated that he was inside the bar, and the first accused pointed to him and his colleagues upon entering the bar. He stated that he was chasing the first accused person because Eric had identified the first accused as one of the culprits yet he also seeks to suggest that he was chasing the accused person in order to find out what the issue between the fighting parties was all about.

Ebrahim Cheziri, the fourth witness to testify knew both accused persons prior to the date in question as he had been a tenant at the house belonging to a relative of first accused. He had seen the second accused and first accused visiting at that house. The deceased was his work mate. On the day in question he was drinking beer at a night club. He was in the company of Tinashe Nyauswa and the deceased. They were joined by Eric Jamhu who told them about an altercation which he had had with some boys outside the nightclub. The accused persons entered the night club whereupon Eric Jamhu identified them as the persons he had had a misunderstanding with. The witness then left to go and check on the meat which was being roasted outside the nightclub. When he was returning into the nightclub he observed the accused persons being chased by the deceased, Erick Jamhu and Tinashe Nyauswa. The deceased was the one leading those who were chasing after the accused persons. The accused persons were running while holding each other's hands. He entered the club and left the meat which he was carrying inside before going out to follow those who were chasing the accused persons. He told them to stop what they were doing. He stated that the deceased caught up with the first accused person who had stopped. The deceased had his fists clenched preparing to attack the first accused person. The first accused then stabbed the deceased under the armpit. There were other people around who were watching the fight. He stated that after stabbing the deceased the first accused person ran away as Eric and Tinashe pursued him. He did not see where the second accused person was at the time that the deceased was stabbed by the first accused. This witness also contradicted the last witness, Tinashe Nyauswa. While the latter stated that he did not take

part in the chasing of the accused persons when they got out of the nightclub, the witness's evidence was that he was part of those who were chasing the accused persons.

Simon Makosa was the fifth witness to testify. He knew the first accused as he was a brother of his friend. The second accused was a neighbour. On the day in question he and the two accused persons went to the shopping centre to buy some beer. When they entered the bar he was in front with the two accused persons following behind him. When he was at the counter he observed that the two accused persons had a misunderstanding with some persons who were inside the bar. They went outside. When he followed outside he did not follow them but proceeded to his residence which was in another direction. The first accused person arrived at home when the witness was already there and informed the witness and Garikai Mbewe that he had stabbed a person with a knife. The accused person cleaned the knife by washing it. The accused person then left.

The last witness to testify, Nyasha Negato, a constable in the Zimbabwe Republic Police, was involved in investigating the murder of the deceased. He was based at Banket Police Station. On 2 November 2015 he was on duty in the evening when a telephone call was received at the police station about a person who had been stabbed at Kuwadzana Shopping Centre. The witness led the team towards the shopping centre. On the way he met some of the witnesses who were coming to the police station in connection with the case. He instructed some of the witnesses to proceed to the police station while he and other persons went to the hospital after being advised that the deceased had already been transported there by a well-wisher. They passed by the scene where they met the supposed well-wisher who advised that the deceased had died. At the scene the witness noticed blood at three positions. The first position was where, according to the information given to him, the deceased had been stabbed. There was another point close to where the deceased had been stabbed where there was also blood. The third point was where the deceased had been taken from when he was conveyed to hospital. He was assisted by Ebrahim Cheziri to locate where the accused persons could be found as Cheziri had once stayed at the same residence with the first accused. They first got to the residence of first accused's brother where they asked to be led to the first accused's residence. They did not find the first accused at his residence. They later found the first accused sleeping at the second accused's residence. Accused stated that he had struck someone with a stone but denied stabbing

a person with a knife. The witness's investigations had suggested that the second accused was also involved in the offence as the knife which had been used was said to belong to him. According to this witness the information he got was that the second accused had thrown away the knife. On being questioned by the state counsel, the witness stated that he had recovered the first accused's slippers at the scene. They searched for the knife but failed to recover it. In cross-examination he stated that the distance between DT Chitekete Night Club and the point where the deceased was stabbed was about 50 metres or more. He also stated that the first accused's slippers were recovered at different positions after the position where the deceased had been stabbed. The witness also stated during cross-examination that he had witnessed the recording of the warned and cautioned statement from the first accused person, and in that statement first accused person admitted that he had stabbed the deceased person but that he was defending himself from an attack by the deceased and his friends. The witness also stated during cross-examination by Mr *Chokowore* for the second accused person that he received the information that second accused was the owner of the knife from the first accused. According to the witness, the first accused stated that he had returned the knife to the second accused who, in turn, stated that he had discarded the knife.

The evidence of Simbarashe Chima which was admitted in terms of section 314 of the Criminal Procedure and Evidence Act was as follows. He is a member of the Zimbabwe Republic Police stationed at Banket Police Station. On 2 November 2015 at about 2150 hours he was part of the team of officers who looked for the accused persons. On 3 November 2015 at about 0900 hours he went to Banket District Hospital where he witnessed Dr Makova conducting a post-mortem on the remains of the deceased. On 4 November 2015 at about 1450 hours the accused persons and the witness led him on indications to the scene of the crime. Pursuant to those indications he drew up a sketch plan. He was led by the first accused to the second accused's residence hoping to recover the knife used to stab the deceased. However, the knife was not recovered. He recorded statements from the accused persons after properly warning them. According to him, the accused persons made their statements in their sound and sober senses, freely and voluntarily without any undue influence.

The prosecution closed its case after leading the evidence of the witnesses summarized above.

The evidence led above did not link the second accused to the offence. The witnesses who testified stated that it was the first accused who stabbed the deceased. Although Nyasha Negato's evidence suggested that the knife belonged to the second accused and that he is the one who had thrown it away there was nothing to suggest how that fact linked him to the stabbing of the deceased person. After all, the first accused admitted in his defence outline that he is the one who had cleaned the knife and thrown it away. There was therefore no evidence to justify placing the second accused person on his defence, hence his acquittal at the close of the case for the prosecution.

The first accused relied on his defence outline and also gave oral evidence. His evidence was that on 2 November 2015 he went to DT Chitekete Night Club in the company of Joseph Masiye. Upon entering the night club Eric Jamhu who was seated with his friends in the bar pointed to him and told his friends that the first accused person was the person he had had a misunderstanding with earlier on. Eric Jamhu and his friends confronted him. He walked outside. Nine people who included Eric Jamhu and the deceased followed and attacked him using open hands and clenched fists. He ran away with the assailants in pursuit. He turned at some point and told one of them that if they continued to assault him he would stab one of them with a knife. They were undeterred. Eric Jamhu picked an iron bar from a braai stand. They also had bottles and bricks. They caught up with him, apprehended him and continued with the assault. That is when he stabbed one of them. Before he stabbed him the now deceased had held the accused by his collar. He stated that he did not realize where he was stabbing because of the darkness. The first accused stated that after he had stabbed the deceased the latter told his colleagues that he had been stabbed. They, however, continued to pursue him until they eventually gave up as he continued running. As he was running he left behind his slippers because they had got torn. He stated that he threw away the knife. According to him the police did not recover the knife because they were searching in the wrong place and were trying to force another person to admit that he is the one who had thrown the knife away. He disputed that it was an okapi knife, and stated that it was one that had a black handle and is used to cut vegetables. He stated that if he had not used the knife the deceased and his friends could have killed him.

In cross-examination the first accused person stated that the group of persons who attacked him were indiscriminately assaulting him all over the body. The deceased was holding him while the others were assaulting him. The first accused stated that the knife belonged to him.

From the evidence led the following facts are common cause. There was a misunderstanding and a fight which had ensued between the first accused person and one of the witnesses, Eric Jamhu, prior to the two of them meeting at DT Chitekete Night Club on 2 November 2015. Eric Jamhu went to DT Chitekete Night Club. The first accused person arrived at the night club in the company of the second accused and Simon Makosa. A scuffle ensued during which the first accused got out of the bar. The first accused ran from the night club with the deceased person in pursuit. The deceased person caught up with the accused person. At that time the first accused person then used a knife to stab the deceased under the right armpit. The deceased was conveyed to hospital where he was pronounced dead. Thus from the facts which are common cause it is not in dispute that the deceased was killed by the first accused person in the sense that he died as a consequence of the injuries inflicted by that accused. The postmortem report and the undisputed evidence of Dr Kudzai Makova confirm that fact.

Lynnet Mapiki was not involved in the dispute between the accused persons and the deceased and his colleagues. She is therefore a neutral witness. Her evidence remained intact even after the very intense and able cross-examination by the defence counsel. She acquitted herself as an honest witness who was telling the truth about her observations. She was close to where the deceased was stabbed. She was able to see clearly what was happening because the place was illuminated by the light from the shops and her market stall. The fact that there was enough light to enable her to observe what was happening was not challenged. Even as the other state witnesses, Eric Jamhu, Tinashe Nyauswa and Ebrahim Cheziri, tried to give the impression that the persons who were chasing after the accused person were not armed, this witness stated categorically that they were throwing bricks and that some had bottles of beer in their hands. As regards the evidence of Eric Jamhu, Tinashe Nyauswa and Ebrahim Cheziri, the court found it to be unsatisfactory. In many instances these witnesses contradicted each other. For instance, Eric Jamhu and Tinashe Nyauswa told this court that they did not chase the accused person when they got out of the bar. Yet Tinashe Nyauswa stated that Eric Jamhu did chase the accused person

contrary to his evidence that only the deceased had taken it upon himself to chase the accused. On the other hand, while Tinashe Nyauswa stated that he did not chase the deceased when he got out of the shop, his evidence was contradicted by Ebrahim Cheziri in that respect. The unsatisfactory features of their evidence could be because either they were drunk to the extent that they do not have a correct recollection of the events or they were trying to minimize their involvement in the dispute with the accused persons. The latter reason is more probable given their interest in the dispute as all of them were workmates and friends of the deceased. Save where their evidence is corroborated by that of the other witnesses or is not disputed by the first accused person, the court will not place reliance on their evidence. The other two witnesses, Simon Makosa and Nyasha Negato gave their evidence will. Simon Makosa's evidence only relates to the time that he and the two accused persons entered the night club and the scuffle which ensued soon after that, as well as to the fact that the first accused person informed him that he had stabbed a person using a knife. The witness also testified that the first accused person washed the blood from the knife.

What has to be determined is whether the first accused person had the intention to kill or realized that there was a real risk or possibility that death would result and continued with his conduct notwithstanding that realisation. In determining that question the court must examine the weapon used to inflict the wound, the targeted part of the deceased's body as well as the amount of force applied, among any other relevant factors. The only state witness who saw the accused person stabbing the deceased was Lynnet Mapiki. Although in her evidence she stated that the deceased was stabbed on the left side of the body, no issue was made of that statement by the defence. Her evidence that after the deceased was stabbed he retreated and then collapsed was not challenged. She did not see the type of knife used. The knife used was not produced as it could not be recovered. The allegation in the charge sheet is that an okapi knife was used. The first accused in his evidence in this court disputed that an okapi knife was used and stated that it was a knife with a black handle which could not be folded. That is a material departure from his statements in paragraphs 38 and 49.7 of his defence outline wherein he stated that he used an okapi knife. Also, it was not suggested during cross-examination of any of the witnesses that the knife used was anything other than the okapi knife alleged in the charge sheet. The court therefore finds that indeed it was an okapi knife. Also, the fact that the accused person threw

away the knife shows that he intended to hide its true description. When he was confronted with the specific allegation that he had used an okapi knife to stab the deceased he could have led the police to recover the knife in order to disprove that allegation. Because he explicitly admitted in the defence outline that it was an okapi knife there would have been no need for the state to seek to prove that fact.

The accused directed his blow at the upper part of the body of the deceased. While he stated in his evidence that he intended to stab the deceased on the elbow he clearly foresaw the possibility that he would strike any other upper part of the body of the deceased in the process. He deliberately did not target the lower parts of the body such as the legs or thigh.

As for the force applied, although the postmortem report does not give measurements of the depth and length of the stab wounds, the extensive nature of the wound clearly proves that severe force was employed. The wound is described as “extensive” in the post-mortem report. The severing of axillary vessels is equally consistent with severe force having been applied to inflict the wound.

From the above, the court is convinced that the accused person reasonably foresaw the risk or possibility of death ensuing from his conduct in the circumstances. He continued with his conduct by stabbing the deceased notwithstanding his realization of the risk or possibility that death might ensue. The court is supported in this conclusion by the following passage cited with approval in *S v Mugwanda* 2002 (1) ZLR 574(S) at 580C-G:

“In the present case, the salient facts are that the appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration of four inches and injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion, the only reasonable inference from those facts is that the appellant did subjectively foresee the possibility of such a stab being fatal. In other words, I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences, as he was advancing towards the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body. It is true that he had consumed six bottles of “Kaffir beer”; but this did not prevent him from knowing what he was doing . . . And there can be no question but that the appellant was reckless whether or not death ensued from his action. In the

result, the State proved the required legal intention to kill (*dolus eventualis*); and the conviction was justified.”

In this case although the deceased is the one who approached the first accused person, the court heard that the accused stopped and waited for the deceased to come close to him. He was holding a knife in his hand, ready to strike. And when the deceased got close to him and tried to get hold of him the accused person struck the deceased with the knife. Also, the first accused stated that although he had consumed alcohol he had a full appreciation of what he was doing.

The first accused pleaded self-defence. The defence is recognized as a complete defence in this jurisdiction. Sections 252-255 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Commenting on the defence, Professor Feltoe in the *Commentary on the Criminal Law (Codification and Reform) Act, 2004*, at p. 159, states that our law “recognizes that the infliction of harm upon unlawful attackers is permissible to the extent that such harm was reasonably necessary to ward them off”. In order for the defence to succeed, the following essentials must be established:

1. That the victim, the deceased *in casu*, engaged in conduct which the second accused believed on reasonable grounds that an unlawful attack had commenced or was imminent;
2. That the accused person believed on reasonable grounds that his conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack;
3. That the means which the accused person employed to avert the unlawful attack were reasonable in all the circumstances;
4. That any harm or injury caused by the accused’s conduct –
 - (a) was caused to the attacker and not to any innocent third party, and
 - (b) was not grossly disproportionate to that liable to be caused by the unlawful attack.

Section 253 of the Criminal Law (Codification and Reform) Act; Feltoe, *supra*, at p. 159; see also Jonathan Burchell, *Principles of Criminal Law 5th Ed.*, pp. 125-139.

It is necessary for the court to examine the first accused’s defence that he acted in self-defence, because he was under attack by the deceased and his friends. The unlawfulness of the attack to which the first accused person was subjected by the deceased and his friends cannot be

contested. The attack was clearly under way when the deceased was stabbed. Whatever their grievances against him, they took the law into their own hands by chasing after the accused person and throwing bricks at him. The first requirement of the defence is therefore established.

As regards the second requirement of the defence, the accused person stated that he did not stop but was apprehended near the market place by the deceased and his friends who started to attack him using bricks and beer bottles. He stated that one of his attackers had an iron bar which he had picked from a braai stand. He believed that the attackers would kill him. The reasonableness of his belief must be tested against the proved facts and circumstances of the case. When Eric Jamhu testified the first accused never suggested to him that he had used a beer bottle to attack him or that he had an iron bar with him. Lynnet Mapiki's evidence that the first accused person stopped near her market stall was not disputed. That evidence contradicts the accused's assertion that he did not stop but that he was apprehended. Lynnet's evidence that the accused person did stop was also supported by the evidence of Eric Jamhu. The accused could not therefore have been telling the truth. If he stopped, as this court accepts he did, then clearly he had taken the decision to strike the deceased using the knife. The deceased, according to the evidence of Lynnet Mapiki, was all by himself when he got to the accused person. The other persons were following from a distance and did not constitute a danger that justified the use of the knife in the manner that the first accused person stabbed the deceased. The deceased had only held him by the collar. There was therefore no reasonable ground upon which the accused's belief that stabbing the deceased person with such a lethal weapon was necessary to avert the unlawful attack. Further, there is nothing to suggest that he could not escape from his attackers. In the first place even after the stabbing some of them continued to pursue him. They only stopped because he out-paced them. For these same reasons, the court finds that the means used to fight back by the first accused person were unreasonable in the circumstances. He employed excessive means to avert the attack. There was no real threat to his person from the attackers most of whom were said to be drunk.

While the person stabbed was indeed one of the attackers, killing a person in the circumstances of this case was grossly disproportionate to any harm or injury to which the accused person was exposed. The accused person employed excessive means to avert the attack. The law, including the supreme law in this jurisdiction, values the right to life so much that there

are very exceptional grounds upon which it may be violated. The public must therefore appreciate that if they have to defend themselves against any attack they must exercise due care in order to avoid unnecessary loss of life.

Section 47(1) of the Criminal Law (Codification and Reform) Act provides as follows on the offence of murder:

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

In all the circumstances of this, case, the court comes to the conclusion that while the first accused did not foresee the death of the deceased as a substantially certain consequence of his activity and, therefore did not have direct intention to kill, the facts proved sufficiently establish beyond reasonable doubt that he did foresee the risk or possibility of the death of the deceased as a consequence of his conduct and proceeded to stab the deceased in the face of that realization. See *S v Mugwanda, supra*, at p. 582B-C.

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

National Prosecuting Authority, legal practitioners for the State
Gutu & Chikowero, first accused’s legal practitioners
Gwaunza & Mapota, second accused’s legal practitioners