

THE STATE
versus
SIMBARASHE MUNAKAMWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3, 4, 5 and 7 July 2017

Criminal Trial Murder

ASSESSORS: 1. Mr Chidyausiku
2. Mr Kunaka

M. Manhamo, for the State
R E Mhandu, for the accused

CHITAPI J: The accused is charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. The allegations against him are that on 11 February, 2016 and at Mandaza Village, Chief Nyamweda, Mhondoro, he intentionally and unlawfully caused the death of one Chido Kurwakumire, a female juvenile by stabbing her with a knife repeatedly on and upon her body. The deceased resultantly died of the injuries which she sustained. The State also alleged that if the accused did not act with intent, the court should find that he did realise that there was a real risk or possibility that his conduct might cause death but that the accused nonetheless continued engaging in such conduct.

The accused pleaded not guilty to the indictment. He elected to present a defence outline. In the defence outline he denied the allegations levelled against him and put the State to the “strictest proof” thereof. He averred that his intention was to repossess the uniform that he had bought the deceased and which she was wearing. He stated that the deceased got injured in the process of his trying to repossess the uniform. In the premises he pleaded that he did not intentionally cause the death of the deceased. It should be pointed out at the outset that where an accused person elects to file a defence outline and not exercise his or her right to silence, such

accused places herself or himself within the parameters of s 66 (10) of the Criminal Procedure and Evidence Act, [Chapter 9:07]. The accused is required in terms thereof to give a defence outline with sufficient flesh or material facts such as will inform the prosecution and the court of the basis and nature of the defence. To state as in this case that the accused denies the allegations and puts the State to “the strictest proof thereof” hardly complies with the requirements of the said section. The State will have given the accused material facts and a summary of the evidence of its witnesses. The accused is in turn required to do likewise when he outlines his defence. A criminal trial is not a game of hide and seek but a procedure in pursuit of justice.

The accused runs the risk that a court will make adverse inferences from the accused’s failure to outline his or her defence with sufficient particularity. In terms of s 67 (2) of the Criminal Procedure and Evidence Act, should the court find during the course of the trial that the accused did not disclose a fact (s) relevant to his or her defence and that such fact (s) is one which existed at the time of making the defence outline and that the accused should have been expected to have disclosed it, the court may treat the adverse inference as evidence corroborative of any other evidence given against the accused. The court will keep the provisions of the said section in mind in assessing evidence led against the accused. Before the court vacates the issue of the requirements of a defence outline, it should point out for the guidance of the accused person and counsel that the law protects the accused from the use of the defence outline to bolster the State case at the close of the State case. The proviso to s 67 (1) provides such protection. Section 67 (1) provides that the defence outline and synopsis of witness evidence which the accused is required to prepare and lodge with the court at least 3 days before the trial date shall be received in evidence upon its mere production by the prosecutor without further proof unless the accused shows that the information therein was not given by him.

The proviso to s 67 (1) provides as follows:-

“Provided that except in so far as it amounts to an admission of any allegation made by the State, any information provided by the accused shall not be taken into account for the purpose of deciding whether the accused should be found not guilty in terms of s 198 (3)”.

The proviso is very important. It ensures that the information which the accused may provide in his defence outline is not used against the accused where the State has failed to make out a case against the accused and the accused invokes s 198 (3) and applies for his discharge at

the close of the state case. The proviso ensures a fair trial and ensures that the accused is proven guilty, nor for him to prove himself guilty nor prove his innocence. The accused does not run the risk of incriminating himself. In the view of the court, the accused has nothing to fear by disclosing material facts relevant to his defence because in the absence of the State establishing a *prima facie* case at the close of the State case, the defence outline is not to be considered as evidence against the accused person. The court is however entitled to take into account and consider only the admissions which may have been made by the accused in the said defence outline. An accused cannot be prejudiced by an admitted or common cause fact. The accused person therefore was in this case expected to fully disclose his defence.

Turning to the facts of this case, the material facts are otherwise common cause. It is common cause that the accused's unlawful conduct caused the death of the deceased. The post mortem report produced by consent as exh 3 shows that the deceased had multiple stab wounds upon her body, notably as follows

- i. On the right side of the frontal area
- ii. On the right arm
- iii. On the left arm
- iv. On the right leg
- v. On the left scapulas area

The stab wounds were also mirrored in photographs of the deceased produced as exh 4 by consent. The photographs are marked 4A – G. Photographs marked B, C and D are the ones which depict the stab wounds clearly. The stab wound on the scapular area is in fact just off the deceased's left eye to the left side and is photograph D.

The knife which the accused used to cause the stab wounds is shown on photograph G. It was also produced by consent as exh 1. The court directed that the dimensions of the knife should be measured. The agreed dimensions were that the blade was 15cm long, 3,5cm width and the handle only was 13cm making it easy for the accused to exercise a grip on the handle.

The deceased died from hypovolemic shock secondary to the multiple stab wounds and assault. In layman's terms, hypovolemic shock, connotes a condition where the body rapidly loses blood or fluid supply. The heart in turn fails to pump enough blood to vital organs of the

body leading to quick death due to vital organs stopping working. The deceased therefore died a painful but rapid death. The deceased lost a lot of blood from the stab wounds.

The State led evidence from several witnesses with the bulk of the evidence being admitted. The admitted evidence related to that of the following witnesses as captured in the state outline and the court will not repeat it; David Zimbudzi, a police officer and attending detail who recovered the knife exh 1, recorded a warned and cautioned statement from the accused and took accused for indications whereafter he drew a sketch plan; Jonathan Dzvova who attended the scene and found the deceased lying down facing upwards with accused stabbing the deceased whilst sitting on top of the deceased. Munyaradzi Muzanenhamo took hold of a log and threatened the accused with it. The accused then stoop up and when the witness asked the accused why he had done what he did, the accused responded that the deceased's parents were aware of the reason. The witness observed the deceased who stood up and staggered towards her parents homestead before collapsing some 50 metres from the place where the accused had stabbed her. The accused followed after the deceased as the witness and Peter Musekiwa were attempting to arrest him. The accused was eventually arrested and the witnesses Muzanenhamo and Musekiwa noted that the deceased had died.

The issue which arises for determination in this case is whether or not the accused intended to kill the deceased or if not, whether the accused in conducting himself as he did, foresaw the real risk that his actions might result in the deceased's death but continued in his conduct. The accused did not in his defence outline tell the whole story or background to what motivated him to mount an attack on the deceased. He should have done so or was reasonably expected to have done so. It was not until the court had heard evidence of the accused's wife as the 3rd state witness testifying orally that it began to have some appreciation of what could have been the motive behind the murder of the deceased.

On the fateful day and as testified to by the deceased's school mates, Brendon Kayara and Isabel Musekiwa, the 11th February, 2016 had been like any normal school day. The deceased teamed up with her school mates and were en route to Chitemere Secondary School which they attended. Around 6.00am – 7.00am the day turned into a nightmare. The evidence of the deceased's school mates was that the accused pounced on the deceased after emerging from the bush. They had not been aware of the accused's presence and neither did he announce his

arrival or presence. They just saw the accused unexpectedly emerge from the bush and a side road. He just went for the deceased. The witnesses saw the deceased fall down and the accused attacking or stabbing the deceased with a knife. A lot of time was taken by counsel to get the witnesses to give minute details of how the deceased was attacked. In the view of the court such details are of no great moment because of several factors. It was not disputed that the deceased suffered stab wounds. Therefore it was proven beyond a reasonable doubt that the accused stabbed the deceased using exh 1. The deceased's school mates aforesaid, state witnesses Munyaradzi Muzanenhama whose evidence was admitted and Peter Musekiwa, the latter two of who intervened when the accused was attacking the deceased were all agreed that the accused sat atop the deceased and stabbed the deceased who lay on the ground with exhibit 1. The post mortem report being a neutral piece of evidence compiled after the event clearly showed the positions of the injuries suffered by the deceased and described them as stab wounds. Although they were not measured in depth, the photographs depict them as grizzly deep wounds. In any event, the wounds were so deep that they resulted in a rapid loss of blood by the deceased leading to hypovolemic shock.

The evidence of the deceased's school mates was further that there was no conversation that the accused engaged in with either the deceased nor the said witnesses prior to him attacking the deceased. The accused just went for his target. The only sound they heard was of the deceased screaming upon being attacked by the deceased.

It was not considered necessary therefore to deal with the evidence of each of the above witnesses individually because as properly and fairly admitted by the defence counsel and submitted by the state counsel, the evidence of these witnesses was similar in material respects. The court carefully considered the witness evidence and observed the demeanor of these witnesses. Despite the tender ages of Brendon Kayara and Rachel Musekiwa being juveniles aged 17 years and 14 years and the court having admonished them to tell the truth, they were very composed and coherent in their account of evidence. They were cross examined and stood by their testimonies which remained unchanged. The court was alive to the need to carefully scrutinize the evidence of these witnesses and warned itself that children easily fantasize and may easily narrate what may have come into their imaginations. The court was satisfied that the juveniles told the truth and any doubt which may have lingered in the court's mind was removed

by the corroborative evidence of Peter Musekiwa and Munyaradzi Muzanenhamo, the photographs of the deceased showing the stab wounds and the port mortem report.

The state led evidence from the accused's wife. The accused did not claim marital privilege. The court raised the issue with counsel. Defence counsel apart from not claiming privilege indicated that the accused wanted the wife, Rachel Kurwakumire to testify. It turned out from Rachel's evidence that there was some background to the accused's behaviour. It became common cause as admitted by the accused that on 7 February, 2016, the accused and the witness quarreled over the deceased. The accused openly expressed his affection and preference for the deceased (who was his wife's younger sister) as a wife. This did not go down well with the witness. She unceremoniously took leave of the matrimonial home in Harare and proceeded to her parents' home where the deceased resided with their parents. The witness said that she went to her parents' home to advise her mother of the accused's utterances or intentions and the disagreement or argument which had taken place between her and the accused.

The accused followed to the witness' parents' home on 10 February 2016 in the evening. He was drunk, abusive and although he denied it, he is said to have demanded the deceased's hand in marriage from the deceased's father. The deceased's father George Kurwakumire gave evidence which corroborated that of the accused's wife that the accused was drunk and made the demands to marry the deceased. The accused also demanded to take back his wife and children to Harare. The accused was denied permission to travel back to Harare with his wife owing to his state. He was also told by his father in law that his demands to marry the deceased had to be brought to the fore following the customary channels and that in any event the deceased was still a minor attending school and could not be married off.

A lot of time was taken by counsel in seeking to establish minute details of what transpired on the night of 10 February 2016 at the deceased's parents' home. The court did not consider that the minute details of what transpired were again of any great moment. The court accepted though that there were disagreements and a show of hostilities. It was put to the deceased's father in cross examination that the deceased's mother had been abusive of the accused and dared him to quantify everything he had expended on the deceased so that the same would be refunded. The witness, did not specifically dispute this but was content to decry that whether or not this had taken place, it did not justify the killing of the deceased. In the view of

the court and considering the probabilities, there was no love lost between the accused, his wife and in-laws on the night in question. The deceased was said to have retired to sleep and was not party of the altercation. There was in the view of the court, a disagreeable verbal engagement between the accused and his in laws including his wife. The accused was not well received and in turn the accused did not show respect for the in laws. In short, tempers must have flared and the accused left his in laws place unceremoniously. The events narrated did not in the view of the court cool the emotions in the accused which emotions had started building up from 7 February 2016 when there was an altercation between the accused and his wife which culminated in the wife vacating the matrimonial bed to sleep on the floor and the couple spending a night in disagreeable proximity under the same conjugal roof.

The state led the further evidence of the accused's wife, Rachel and her father. The court was not overly impressed by the evidence and demeanor of Rachel as a witness. She appeared to be emotional. Whilst such attitude was understandable given the quarrel she had had with the accused, the court formed the impression that she was coy with the truth of what transpired at the matrimonial home in Harare, why she decided to go to her parents' home the following morning and what could have happened when she got there as well as minimizing her role and that of her mother in telling off the accused on the night of 10 February 2016. In the view of the court and considering all probabilities, the witness Rachel was part and parcel of the matrix which engendered, provoked or fomented the trail of events which culminated in the accused killing the deceased. On his part, the deceased's father George was more composed. The court believed his evidence that he was just pissed off or annoyed with the accused's behaviour and the events of the night and decided to give the accused a cold shoulder. The court was fortified in its favourable assessment of this witness evidence and conclusions it drew by the fact that even the accused himself did not in evidence allude to any untoward, improper or indecorous conduct or behaviour on the part of this witness. The accused was to testify that the person who hurled expletives, profanities, told him off and showed him the door was his wife's mother.

The accused chose to testify in his defence on oath. History was long. Even when his legal practitioner tried to bring him to deal with the real issues, he would not be directed. He said that he wanted to tell the court everything from when it started. The legal practitioner let him loose to bare it all. The court will not however repeat everything that the accused testified to. The

accused's account of events when synthesized was very not really difficult to appreciate. He testified to the altercation he had with Rachel, his wife on the night of 7 February 2016. This was after the visit they had made to Rachel's cousin. During the altercation which involved the accused's wife refusing to cook for him, the accused brought into play the issue of his desire to marry the deceased. This did not go down with the wife who slapped the accused and also grabbed his phone whilst he was going through messages he used to exchange with the deceased. The wife became even more incensed when she failed to access the messages because the accused's phone had locked. The accused refused to unlock the phone. The accused and the wife slept apart. The wife threatened to proceed the following morning to her rural home, confront the deceased and also expose the deceased's misdemeanors with the accused at the deceased's school.

In the morning of 8 February 2016 the wife's anger had not subsided. It is said, "hell hath no fury like a scorned woman." This saying was fulfilled. The accused's wife did not attend on the accused that morning. She dressed up the children to proceed to her parents' home. It is common cause that the wife proceeded to Mhondoro, without the accused's blessing. The accused said that she took his phone with her. The accused was not happy at the wife's conduct. When he telephoned his wife to return home she responded that she was not going to return. He telephoned the wife's aunt Mrs Kahari to intercede and persuade the accused's wife to return home. On 10 February 2016 the accused again telephoned his wife who indicated that she would return. The accused then thought of hiring a friend with a taxi to accompany him so that he collects his wife and children.

The accused prior to setting off for Mhondoro bought 3 quarts of beer which he consumed. He normally is a moderate drinker who got drunk on 2 quarts. It is not clear as to why he decided to get himself drunk yet he was going to visit his in laws. A son in law would ordinarily be expected to be sober and be presentable to in laws. This is what our cultural standards expect. Although the accused said that he was not drunk, the court did not believe his denial. The evidence of his father in law which the court accepted will be preferred to that of the accused. It is most improbable that there would have been an altercation of the magnitude testified to by Rachel and her father had the accused been in his sound and sober tenses. The

accused in any event lost his bearings and could not pin point his in laws home until directed by passersby that night.

The burning issue of the accused's desire to marry Chido was topical. The accused said that he was respectful and did not want a direct engagement with his father in law. The accused said that his wife told him to go hang and threatened to commit suicide. As already indicated, it was not in the court's view material to determine who said what on the night in question. It suffices to say that the Kurwakumire family was in turmoil. The accused returned to Harare without his family with his demand to marry the deceased having been spurned. The accused said that his mother in law was abusive of him and shouted at him to quantify everything that he had done for the deceased and seek a refund. On returning to Harare the accused did not go to his home but slept in his friend's taxi without realizing it until he woke up in the morning around 5.00 am.

The accused said that he then decided to act on his mother in laws demands that he should recover what he had expended on the deceased. He hired a vehicle to Mhondoro hoping to return to work by 8.00 am. He arrived in Mhondoro around 7.00 am and had to complete his journey on foot after the driver of the car he had hired demanded more money which the accused did not have. On his way he met up with the deceased and her school mates and the deceased expressed surprise as to why the accused was not at work to which the accused responded that there was still time for him to return to work.

The accused testified that he then asked the deceased to go back home and change her uniform because he assumed that she knew what had transpired. He said that the deceased refused and reached out to him to elope with her because the situation at home was no longer bearable. He responded that it was no longer possible for him and the deceased to continue to help each other out and that the deceased should return home to hand back to him other items. He threatened to tear the uniform if the deceased refused. He then held the deceased by the sleeve of her blouse but she shook him off and took flight. In the process the deceased dropped her bag and he took it and followed after her. The deceased tripped and fell down after stumbling on a stone. The deceased got up and started to run away once more. He then decided to and shouted at the deceased that he would now cut the uniform with a knife. He opened his own satchel took out a knife and followed after the deceased. He was cutting off the deceased's

clothes and did not realize that as he did so he was cutting into the deceased's flesh. He had bought the knife on 8 February 2016 to replace the kitchen knife which got lost in his house. He had kept the knife in his bag which he carried to work. He only realized that the deceased was injured after the deceased sat down saying that she had been injured. He said that he tried to lift the deceased but was struck with a bamboo stick by someone. He was subsequently arrested. He said that he did not know what possessed him to act as he did because he had been in love with the deceased for two years and she had not wronged him.

The accused was cross examined. His story was difficult to buy. On one hand he took the position that he did not know what possessed him. If this was his defence then the court expected that he would then not be in a position to explain exactly what happened. On the other hand he purported to give all minute details of what transpired. He therefore was approbating and reprobating at the same time. This left the court wondering as to what his exact defence. Was it diminished responsibility or he knew and appreciated what he was going?

The accused was asked about his warned and cautioned statement. Although he denied its contents, it had been produced by consent as exhibit 2. The warned and cautioned statement was confirmed by a magistrate on 12 January 2017. In the statement, the accused confessed to having killed the deceased after deciding to kill her and also end his own life because the deceased's parents had refused the accused permission to marry the deceased. He stated that he armed himself with the knife to achieve his purpose of killing both the deceased and himself.

The accused sought to deny the contents of his statement. The court did not believe him. He only sought to do so because the statement was now at tangent with his testimony. The accused did not come anywhere near proving on a balance of probabilities that the statement was not his nor that he did not freely and voluntarily make it. The court noted that the accused did not deny the production of the statement nor its authenticity either in evidence in chief or in his defence outline which as observed was skeletal in content. The accused's statement appears to be consistent with the rest of the evidence led against him. The state witnesses said that he pounced on the deceased and stabbed her as she lay on the ground. The accused was seen by Peter Musekiwa to attempt to stab himself but only failed to do so because the knife blade bent and did not penetrate him. The accused did not come about the knife which he used by chance. He had carried it all the way from Harare intending to put it to use. The death of both the deceased and

himself was his avowed wish and desire. The accused decided that if he could not have the deceased, then no one would. Counsel referred the court to the cases of *S v Mugwagwa* SC 19/2002 and *S v Zimhondi* HH 179/15 in arguing that there was a thin line between actual intent and foreseeability. It is correct as stated by the Supreme Court that the difference between actual intent and foreseeability is one of degree. However in the case before the court, the court did not have to distinguish between the two forms of intention. The accused pre-planned what he wanted to do and set out to achieve it. He clearly intended the result. The *Zimondi* case is distinguishable in that the accused had been jilted by his girlfriend and acted out of that emotion. In this case, the deceased was a victim who had not jilted the accused. The accused had a score to settle with his wife and his wife's parents. The deceased was caught in between and became the victim. The only common denominator between *Zimondi*'s case and the case before the court is that both cases involve conduct motivated by passion.

The evidence against the accused in this case was overwhelming and was further corroborated by the accused's failure to bring the court into his confidence when he chose to be coy about disclosing the material facts surrounding his conduct in his defence outline as he was expected to. The State therefore proved its case beyond a reasonable. The verdict of the court is that

"The accused is guilty of murder with intent as defined in section 47 (1) (a) of the Criminal Law (Codification Reform) Act, [Chapter 9:23]."

SENTENCE

The court gave *ex-tempore* reasons for sentence and sentenced the accused to 17 years imprisonment. It was indicated then that more detailed reasons would be availed in due course. These are they.

Following conviction, counsel sought to address the court in mitigation and aggravation of sentence in line with the provisions of s 47 (2) of the Criminal Law Codification and Reform Act as read with ss 337 and 338 of the Criminal procedure and Evidence. The sections were amended by Act No. 3/2016 and Act No. 2/16 respectively in June, 2016 to align the Acts aforesaid with s 48 (2) of the Constitution. In brief the amendments provide for the definition of aggravating circumstances in cases of murder and give a court a discretion to impose the death sentence where a murder is found to have been committed in circumstances of aggravation.

The court pointed out to counsel that the offence *in casu* had been committed in February, 2016 before the amendments referred to. Counsel were asked by the court whether the amendment acts had retrospective effect and they agreed that they did not have such effect. Thus, consequent to the provisions of s 17 (1) (d) of the Interpretation Act [*Chapter 1:01*] which provides that the repeal of an enactment does not affect an offence or penalty provided for under the repealed enactment, counsel proceeded to address the court on extenuating circumstances in line with the provisions of s 337 and 338 of the Criminal Procedure and Evidence Act before the sections were amended.

It is not necessary to pit the defence counsel submissions against those of the prosecutor as regards the existence of extenuating circumstances. The prosecutor conceded that extenuating circumstances existed in the case. The court in agreeing with the prosecutor's concession found the case to be borderline as regards the existence of extenuating circumstances. In fact, the court was split in that one of the assessors did not agree that extenuating circumstances existed. The majority decision however ruled the day in accordance with the provisions of s 10 (2) of the High Court Act, [*Chapter 7:06*].

Extenuating circumstances are factors connected to the commission of the offence which mitigate the convicted person's moral blameworthiness. See *S v Siluli* SC 146/04 and cases therein cited. *In casu*, the accused committed the murder under emotion arising from a build-up of anger which started from 7 February 2016 up to the date of the murder on 11 February, 2016. The accused's emotions were tested to the limit starting with the unceremonious departure of his wife to her parents' home after she had refused to cook for him and vacated the matrimonial bed to sleep on the floor. The wife's refusal to carry out the accused's request for her to prepare him food led him to rebuke the wife by scorning her and expressing his desire to marry the wife's younger sister as he felt that at least the younger sister could provide for his needs.

The accused was an unsettled person throughout the period and took to drinking alcohol and getting so intoxicated on the night preceding the murder that he not only lost directions to his in-laws home but engaged in verbal exchanges with them. The accused's wife and her mother did not help the situation because the wife told the accused to go and hang whilst the mother in law told him off and in anger and in a show of ingratitude shouted at the accused to quantify everything he had done for the deceased and seek a refund.

The events of the night of 10 February, 2016 cannot be divorced from the events of the morning of the murder. The accused woke up early in the morning still feeling hurt. He acted under provocation arising from the events of the previous night. As clearly emerges from a reading of the accused's warned and cautioned statement which the court accepted as evidence the accused was so hurt by the refusal of the deceased's parents to accept his offer to marry the deceased that he decided to kill both himself and the deceased in a typical case of "if I cannot have her, then no one will." The circumstances of this case are reminiscent of the Romeo and Juliet theme depicted in William Shakespeare's book or drama of the same name. The distinguishing feature is however that *in casu*, the accused's attempt to stab himself failed on account of the knife failing to penetrate him otherwise it could have been a double tragedy as in Romeo and Juliet.

The court considered the matter to be borderline between a finding of no extenuating circumstances and giving the accused the benefit of the doubt because the deceased was caught in cross fire. She admittedly was at the centre of the turmoil. However, she did not wrong anyone. The accused hunted for her and attacked her in a cowardly fashion. This notwithstanding, the court was of the view that the accused did not act out of an inherent wickedness within him but was overcome by a build-up of emotional stress, provocation and intoxication. In manner of speaking, the accused can therefore be said to have acted in a state of diminished responsibility in its wide definition.

Having found extenuating circumstances to exist, counsel made submission in mitigation and aggravation of sentence. There are no compelling personal mitigating factors which were submitted on behalf of the accused person. His circumstances were ordinary. He is 33 years old, married with two minor children and is the sole breadwinner for his family. Through his employer however he assisted with costs of the burial of the deceased. He bought a coffin, provided food for mourners and contributed further groceries for the memorial service. In court, he expressed a desire to make a formal apology to his in-laws who were in court as he had never had the chance to do so owing to his incarceration since his arrest. The court gave him leave to do so from the dock. In his own words he said, "I am asking for forgiveness from you my in-laws and the court. May the court exercise lenience. I would like to make compensation."

The gesture by the accused to publicly apologize to his in-laws in person was a gesture that the court applauded as it showed that the accused owned up to the wrong which he committed. Section 16 of the Constitution mandates the State and all institution of government at all levels to promote and preserve cultural values. Bearing this in mind, the court received the accused's plea for forgiveness and offer to compensate his in laws as a gesture that fell within the parameters of our culture. Due regard was given to this although the accused was told that the court was not equipped with sufficient material to be able to make any compensatory orders. The issue was therefore left to the deceased's family and the accused to explore further within the confines of the relevant laws and cultural practices.

The accused was first offender. However the nature of the offence which he committed was a capital offence. It seldom happens that the court comes across repeat offenders with a conviction for murder. The serious nature of the offence far outweighs the consideration of showing leniency to the accused by virtue of it being his first offence. Whist the fact this was the accused's first offence was taken into consideration, no undue weight was given to the fact.

The accused person stood in *loco-parentis* towards the deceased because he looked after her by providing for her needs. It was an abuse of such relationship for the accused to wish to make the deceased his wife at the tender age of 15 years. The accused's conduct of starting a love affair with the deceased was therefore abusive of the deceased. The accused knew that the deceased was under the age of marriage when he engaged in a love relationship with the deceased. Such conduct should be frowned upon by the courts which have a mandate under s 19 of the Constitution to ensure that the best interests of children be made paramount.

The accused committed the offence in a brutal and callous manner using a dangerous weapon, a knife. The deceased could not defend herself. She died a painful though quick death. The accused was selfish and cowardly in his conduct. He attacked a defenceless child. The murder was heartless, senseless and selfish.

It did not however escape the observation of the court that this murder could have been avoided had the accused not allowed his emotions to get the better of him. Similarly, the accused in all probability would not have been driven to extremes had his wife and mother in law kept their emotions in check. The court needs to emphasize that family disputes should be resolved through dialogue and upholding our cultural practices. A mother in law and her son in law as

happened in this case should never stand toe to toe and exchange unsavoury words. The accused from the evidence was hurt by his mother in law's utterances that were full of scorn. The accused had hitherto respected his in laws and assisted the family by providing for the deceased. The accused's mother in law should just have ignored the accused's demands or requests to marry the deceased's, moreso as the accused was drunk and acting out of character. By engaging in verbal exchanges with the accused, the mother in law simply fuelled the fire. The deceased's father had directed the accused to use the go-between to make his marriage requests. The father in law ignored the accused after realizing that he was not himself and was drunk. The mother in law and the accused's wife did not follow the exemplary reaction shown by the father in law. They should have done so. Had emotions not substituted reason, this murder was unlikely to have taken place.

The court considered that human life had been lost and would not be salvaged. Death however arose from a family altercation where both the deceased and his in laws will be affected by the loss of the deceased. The accused could not be described as a dangerous criminal nor an inherently wicked person. Had the court not made a finding that the offence was passion driven, a sentence of imprisonment for life may well have been appropriate as suggested by the State. The court despite the borderline finding on extenuating circumstances considered that a sentence which would ensure the reintegration of the accused back into society was appropriate. It was for the above reasons that the court considered the 17 year sentence as merited in this case.

National Prosecuting Authority, for the State
Muvingi & Mugadza, accused's legal practitioners (pro-deo)