

STATE
versus
VINCENT VHIRIRI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17, 18, 19 February 2016 and 14, 16 March 2016

ASSESSORS: 1. MR MUTAMBIRA
 2. MR KUNAKA

Criminal Trial - Murder

S WMunyoro, for the State
I Chingarande, for the accused

CHITAPI J: This matter comes up for judgement. The accused faces a charge of murder as defined in s 47 of the Criminal Law Codification & Reform Act, [Chapter 9:23]. The details of the charge preferred against the accused are that on 12 November 2012 at house no 18958 Unit L Seke Chitungwiza, the accused unlawfully with intent to or realising that there was a real risk or possibility that his conduct may cause death threw a brick at the deceased Lavender Manka which brick landed on the deceased's head thereby inflicting injuries from which the deceased died. The accused pleaded not guilty to the charge.

In his defence outline the accused admitted that he is the one who threw a stone like rubble which struck the deceased. He stated that the stone like rubble had been thrown at him by Violet Manka and it had struck him on his shoulders. He then picked it up and threw it back in the direction where it had come from without thinking and that the stone like rubble then unfortunately hit the deceased. The accused averred that he did not have any intention of striking the deceased or killing anyone. The accused's defence is therefore that of causing the deceased's death accidentally. The State led evidence from 5 witnesses whose evidence is summarised as follows:-

Violet Manka, was the 1st witness and is a daughter to the deceased. The accused is his erstwhile brother in law. On the fateful night at around 9.30pm she was in bed with Venna her younger sister who is the accused's erstwhile "customary law wife". We have indicated that was the accused's customary wife in brackets for the reasons that shall become apparent when we deal with the evidence of Venna's mother. Venna had just delivered a baby who was 2 or 3 days old. The trio slept in one room. House no 18958 Unit L, Seke, Chitungwiza, where the offence took place is a 7 roomed house with 2 outside or access doors. There is one main one door used by the Manka family and a second one which leads into a passage. The witness had possession of the keys and for a person to get inside the house that night that person would have had to request for the keys or that the access doors be opened by the witness.

There was one lodger or tenant who had already retired to sleep when the fateful events occurred. The accused made a forced entry into the room in which the trio slept. He kicked the door open after he had identified himself when the witness had enquired as to who was hitting the door. On entering the room he made for Venna whom he started assaulting with a plank. He also held Venna by her hair and legs pulling her out of the room and dragged her outside. The witness first made sure that the new born baby was safe and thereafter followed outside the room to where the accused was assaulting Venna. The witness was shouting for help. She was also struck by the accused on the right shoulder and she pointed to a healed scar on her shoulder which she said was caused by the assault upon her by the accused. The accused used stones to attack the witness and he also threw into the dining room where the witness had retreated together with her mother and father who had woken up to the altercation and were trying to reason with the accused to stop assaulting his wife.

The accused was not deterred and continued his onslaught and in the process he struck the witness's mother. The deceased then admonished the accused person whom he accused of underrating him because of his condition as he, the deceased walked with the aid of a stick. The deceased ordered the accused to leave the premises but the accused did not do so.

As the accused continued to throw stones into the dining room and would not leave, the deceased opened the door to confront the accused and the witness followed the deceased outside. The deceased again asked the accused whether he was underrating him because the deceased was an invalid. The accused responded that he was not interested in

the deceased but in Violet because Violet wanted to take away his wife and that it was Violet that he wanted to assault. The accused advanced towards the witness.

The witness who was now outside the house ran away into the neighbour's yard and circled a tree thereat. As the accused continued towards her, she ran to the deceased and tried to shield behind him. The accused was uttering the words "I will kill you. I will destroy you". The deceased shouted at the accused to leave his children alone. The accused was saying a lot of profanities. He then picked up what turned out to be a piece of brick and struck the deceased with it on the side of the head and the deceased fell down. He was bleeding from the wound, the mouth and the nose. The witness called out to neighbours for help and the neighbours came but did not immediately render any assistance because the accused was violent. The neighbours stood 10 meters away from where the deceased had fallen and the accused ran away after one of the neighbours had shouted, "hiya" and a lady shouted, "Vincent you have killed a person".

The witness tried to render assistance to the deceased who appeared to have been rendered unconscious by the blow to the head and his falling down. He only came to after water was poured upon him. The witness accompanied the deceased to Zengeza Clinic and later to Parirenyatwa Hospital. The deceased never spoke after the incident until his death on 21 January 2012. If one spoke to him he would just point to his head. Under cross examination the witness denied that she and Venna were discussing the siring of the new born baby by another man who was not the accused and therefore denied that this could have angered the accused. The witness agreed that she did not enjoy a good relationship with the accused because of his violent tendencies towards the witness's younger sister Venna.

She denied attacking the accused using pieces of rubble or in any manner. She maintained that she was the target of the accused's attack apart from Venna. In answer to questions by the court the witness denied that the accused threw the brick at the deceased but averred that the accused actually struck the deceased with the brick whilst holding it. During the altercation the accused was also shouting that he wanted to kill the witness. The accused was accusing the witness of wanting to take Venna to South Africa with her. The witness believed that the accused was the father of the newly born baby and its parentage was never discussed by the witness and Venna. She was hearing for the time in court that there was a dispute concerning who was the father of the child.

The second witness was Venna Manka. She is separated from the accused. She separated from the accused two years before the incident of 12 November 2012. The separation was caused by the accused's violent tendencies. He was in the habit of attacking her physically with bodily force and weapons. She is a daughter to the deceased and a younger sister to Violet, the last witness. She testified that earlier that day, the accused had come to the premises in the afternoon with the intention to see his child of three years old. She argued with the accused over that child's upkeep as she was not happy with the goods which he had brought. The accused had not been maintaining the child since their separation two years back. The witness's mother intervened in the argument and advised her to just accept what the accused had brought. She did so and the accused went away after that. Around 9 pm the accused returned. The witness was in her bedroom with Violet and the newly born baby and she was conversing with Violet. She heard the door being unlocked and thought that it was one of the tenants. She then heard a knock on their bedroom and Violet enquired as to who it was.

The accused did not answer but instead destroyed the door by striking it using a brick or some weapon. The accused shouted that he had heard what the witness and Violet had been discussing and that he was going to assault the witness. The accused pulled the witness out of bed by grabbing her plaited hair. He was kicking her whilst dragging her out of the bedroom. She was dragged to the entrance door at which point the sister Violet came to the scene to assist and started fighting with the accused. The accused then threw stones at Violet. At this stage the witness was lying on the ground and feeling numb from the beating or assault upon her by the accused. She managed to rise from the ground and escaped back into the house leaving accused and Violet still engaged in the affray.

As the witness got into the house she by passed her mother who had left her bedroom to see what was happening. She also realised that there were people who were in the dining room. She proceeded into a tenant's room and hid there. The tenant did not go out of the house because of the violence outside. The witness did not see much of what was happening whilst she was in hiding but she heard the deceased shouting at the accused saying, "why come to this house at this time, why not come tomorrow and table your issue for discussion". She also heard the accused respond saying, "old man keep quiet I will finish you all". She left the tenants room where she had been hiding and went outside the house where the commotion was. The witness saw that the accused was holding a brick and making motions as if to strike the deceased. Some members of the public were calling

out to the accused to stop what he was doing. She also observed the deceased pushing away at the accused.

Violet was shielding behind the deceased. The accused then struck the deceased with a brick and ran away. She also heard Violet saying to the accused what he heard was false. She said of the accused that each time the deceased asked the accused to go away the accused would say, "old man I will destroy you". She said that when the accused forced himself into their bedroom, she was discussing with Violet about her sojourns to South Africa and never discussed about the new baby.

Under cross examination the witness surmised that the accused thought that Violet wanted to take her to South Africa as Violet had been away for three years. When prodded further she said that when the commotion was taking place outside she heard the accused saying to Violet that he had overheard her saying that she wanted to take the witness to South Africa. She stated that the deceased wanted the accused to leave the premises but the accused was not persuaded to leave. Violet was assisting the deceased to persuade the accused to live. The witness denied that the deceased ever struck the accused with an iron bar. The witness had not told anyone about the person who fathered the newly born baby and did not discuss the issue with Violet. She was adamant that there was no reason for the accused to have suspected or believed that the newly born baby was his because she was last intimate with the accused with the accused in 2010.

Questioned by the court, the witness said that the accused picked the brick which he struck the deceased with from where he stood in the neighbour's yard. She said that there was no demarcation between the deceased and the neighbour's yards. She denied that the accused under attack when he picked the brick and maintained that he was being ordered to leave by the deceased. She said that despite her separation with the accused, the latter continued to say that she was his wife and continues to do so to date. She thought that by having an affair and conceiving a child not sired by the accused, the accused would be persuaded to accept that their affair was over but he has remained undeterred. The witness said that despite her present pregnant condition not by the accused, the accused remained obsessed with her and wanted to be intimate with her.

The third witness was Keresia Manka. She is the deceased's wife and mother to Violet and Venna. The accused was a son-in-law to her for three years although he did not completed marriage rights having only paid two goats in a ceremony called *masungiro*. No lobola was charged of the accused person. This is the reason why the fact of the alleged

customary marriage between the accused and Venna was put in brackets. It is because the requirements for a customary law marriage were not satisfied and the two at law could not be said to be customarily married.

On the night in question she was awakened by Violet who reported that the accused was assaulting Venna. At that time she had already retired to bed with the deceased. She came out of the bedroom and witnessed the accused throwing stones and she was hit on her hand. She pleaded with the accused to go away and return the following day. She was wearing a petticoat only and decided to return into the bedroom to properly dress up. As she returned to the bedroom she bypassed the deceased who was going out to check on the commotion. As she was dressing up she heard screams from outside. She rushed outside and found the deceased lying on the ground. She called out to the deceased but he did not respond. The deceased was then ferried to hospital by a friend.

The accused returned later and smashed windows to the house using stones which he threw. The deceased was hospitalised for two to three weeks and discharged. He later died of the injuries resulting from the assault from the accused. She said that the deceased had previously suffered a stroke and walked with the aid of a stick. She did not witness the accused striking the deceased with a stick.

Nothing eventful came out her cross examination except that she confirmed that the accused was of a violent disposition. She believed that the newly born baby was sired by the accused because the accused continued to brag that Venna was his wife. She heard the accused accusing Violet of wanting to take Venna to South Africa. She said that the accused was accusing Venna of being a prostitute. She confirmed that the accused had earlier on brought some items for the child which Venna was refusing to take. She did not check the items. The accused on his return, that is after the deceased had been taken to hospital was shouting that he had hit the deceased because his children were prostitutes and what was left was to deal with the mother.

Isaiah Gosa was the 4th witness. He is the deceased's neighbour. On the fateful night he was awakened by the commotion outside. He went out of his house to investigate the commotion and observed that the accused was involved in an altercation with Violet. He then saw the deceased who trying to pacify the accused saying, 'it is well my son-in-law you can come tomorrow so that we deal with the issue'. He observed the accused continue to advance towards Violet and the deceased came in between the two saying "I have already said come tomorrow". The accused was not deterred. The deceased then

lifted his walking stick and shouted at the accused that he would hit him with it. He observed the accused picking a brick from the ground and he struck the deceased with it on the head and the deceased fell to the ground.

The accused ran away and the witness mounted his bicycle and followed the accused intending to apprehend him but failed to catch up with the accused. He then reported the incident to a neighbour, a police constable whom he called Sadomba and the two returned to the scene. The policeman then helped in having the deceased ferried to the hospital. He said that the accused later on returned and smashed some window panes to the deceased's house. The witness said that at the time that the accused struck the deceased with the brick the accused was a meter away from the deceased and Violet was behind the deceased holding on to the deceased's waist. The accused aimed a direct blow and struck the deceased with the brick. He did not throw it.

Under cross examination the witness said that during the commotion the accused was accusing Violet of causing the breakdown of his marriage and allowing Venna to be a prostitute. The witness also heard Violet ask the accused why he wanted to assault her. The witness said in answer to questions by the court that he saw the accused pick up the brick from where the accused stood. The witness identified the piece of brick in issue, that is, exh number 5.

Clever Sadupwa is a constable with the Zimbabwe Republic Police and was the 5th witness. He stays in the neighbourhood of the crime scene. He knew the accused especially for his violent behaviour. On the night in question, he was awoken by the commotion and received a report from Isaiah Gosa. He proceeded to the crime scene and observed the deceased lying on the ground unconscious. He received information on what had taken place. He recovered the piece of brick, that is exh 5 and observed a walking stick which lay next to where the deceased lay unconscious. He identified exh 5 in court. He helped ferry the deceased to a hospital. Upon his return he was shown window panes which were said to have been smashed by the accused. The State closed its case and the accused gave evidence on oath in his defence.

His evidence was to the following effect:-

He firstly apologised to the deceased's relatives and to the court for causing the deceased's death. On the fateful day he went to the deceased's house in the afternoon to leave groceries and clothes for the newly born baby. Included in the items was a baby feeder. He had an altercation with Venna over the goods because Venna accused him of

having gone to buy the goods with another woman since the items were beautiful and could only have been chosen with the assistance of a woman.

The mother in law Keresia Manka interceded in the altercation. There were various other exchanges which the accused testified to which the court will not detail save that the accused then said that he produced US\$30-00 from which he took US\$2-00 for his transport leaving US\$28-00 which he gave to Venna as he realised that Venna wanted money. He then proceeded to the bedroom to see the newly born child. He said that whilst he was still at the deceased's house, Venna's phone rang. He asked who it was and Venna responded that it was a wrong number and they argued over this. He left and when he got to his home he discovered that he had left his phone at Venna's place.

He returned to check on his phone and agreed with Venna that he could leave the phone charging and return to pick it up later. Around 8 or 9 pm he returned and was let in by a tenant. He then overheard Venna and Violet speaking about the events of the afternoon and in particular to Venna was saying the newly born child's father had phoned and Venna had answered by saying it was a wrong number in the accused's presence. He then said that he then knocked on the bedroom door and identified himself. On entry Venna knelt down and said that what the accused had heard was not true. The accused simply demanded to collect his phone but Violet started shouting that the accused was spoilt by Venna. Venna continued to plead for forgiveness. He said that Violet was shouting at him over nothing. He clapped Venna and the commotion started.

He said that the deceased came holding an iron bar which was being used to secure the door and hit with it. He ran outside. He knelt down and asked the deceased for forgiveness whilst clapping his hands. The deceased hit him again. Violet then picked some pieces of rubble and started pelting him with those pieces. He went round the front of the house to a neighbour intending to seek refuge. The place he went to is his uncle's place. He said the uncle had gone on night shift. He knocked at the door without a response. He then went to the gate of the uncle's house and the Violet and the deceased followed him. Violet was throwing stones at him and one stone hit him on his back. He then picked a stone and threw it back in the direction it had come. He then saw Violet go to where the deceased was. He then ran away to his home.

He said that Violet was aggressive and was shouting at the accused saying that the accused should not underrate him and that she does not allow a man who does not sleep with her to ride rough shod over her. He was 6 meters away from the deceased when he

threw the stones. When asked by defence counsel how long it took him to throw the stone from the time he was hit he said no time at all because he heard as though a needle had pricked him and he just picked up the stone and threw it back. He said that he only got to know that the newly born child was not his as a result of the discussion he had overheard between Venna and Violet that night. He said that he did not directly strike the deceased whilst holding the brick but threw the stone or brick when he was 5 metres away from the deceased and Violet. He just turned round and threw the brick without checking where the brick would land.

Under cross examination he said that Violet was the aggressor and continued to pursue him whilst the deceased for his part hit him with an iron bar. When asked by the court who was in front of who between the deceased and Violet when he threw the stone he said that Violet was in front but when she realised that the accused was about to throw the stone, she went round behind deceased. The accused could not explain why he did not just run away from the assault using the entrance he had used to come into the home stead as it was open. He said that he wanted to inform his uncle first. He however did not know the uncle's name but he referred to him as *Baba Munyaradzi*.

He said that he saw Violet throw a brick and it is the same brick which he picked up and threw back at Violet and the deceased. He said that he was otherwise leaving the deceased's homestead but he came under attack. He was not told the month that Venna fell pregnant but thought that it was in April 2012. He expected the baby to be born in November 2012, that is 6 months reckoned from April 2012. The accused had no witnesses and the defence closed its case.

In analysing the evidence in this case the court also took into account exhibits which were produced by consent. These include exh number 4 which is the accused warned and cautioned statement. When asked whether he had any injuries at the confirmation proceedings the accused responded in the affirmative. He said that he had injuries on his arm, on the right hand and the wrist on the left hand and on the left side of his back. Asked how he had sustained the injuries he said that he sustained the injuries as a result of the assault that was perpetrated on him by Lavenda Manka, the deceased who was using an iron bar and Violet Manka who threw rubbles at him. In the warned and cautioned statement, the accused said that he understood the caution and that he admitted assaulting Lavender Manka with a stone.

He said, “his daughter called Violet is the one who struck me with a stone. I took a stone which was on the ground with the intention of striking his child Violet but it went on to strike the now deceased. I had no intention to strike the now deceased. I had left their place of residence but they followed me. The now deceased strike me with an iron bar on my back and on my arm.”

The court also considered the post mortem report exh number 3 and notably from the post mortem report under s 18 on observations on the head, the doctor observed a bruise under the scalp, frontal area and parietal area. The doctor also observed a depressed skull fracture within the left parietal area and fracture on the right parietal and the brain oedema. His conclusion was that the cause of death was a severe head injury due to assault. It is accepted that the injuries from which the deceased died were caused by the accused. It was not disputed that the accused had injuries which he pointed out to the confirming magistrate. In the court’s view the fact that there was an altercation which involved physical confrontations is beyond doubt.

The State and defence counsels filed written closing submissions. The State persisted in its submissions that it proved a case of murder with constructive intent as defined in s 47 (1) (b) of the Criminal Law (Codification & Reform) Act. Its argument is that the accused must have realised that there was a real risk or possibility that his conduct may cause death but continued to engage in that conduct despite the risk or possibility. The defence counsel submitted that the State did not prove a case of murder but conceded that it proved a case of culpable homicide.

The position taken by the defence counsel makes it somewhat easy for the court to make a determination in the matter. This is so because the defence concession to a competent verdict of culpable homicide means that the court must decide issues of *mens rea* only as the *actus reus* is common cause.

This is a matter in which the evidence of the State witnesses and that of the accused conflict in material respects in regard to material issues which the court must consider in reaching its determination on whether the appropriate verdict is murder or culpable homicide. Before reaching a verdict, a close analysis of s 47(1)(b) of the Criminal Law (Codification & Reform) Act is necessary. The section reads as follows:-

Any person who causes the death of another person intending to kill the other person or realising that there is a real possibility that his or conduct may cause death and continues to engage in that conduct despite the risk or possibility is guilty of murder.

In order to found a conviction for murder under s 47 (1) (b) as prayed for by the State, it must be proved beyond a reasonable doubt that the accused must:-

- i. Have realised that there is a real risk or possibility that his conduct may cause death: and
- ii. He must continue to engage in that conduct despite the risk or possibility.

The two requirements are conjunctive. The accused must continue to engage in the unlawful conduct despite realising the risk or possibility of death. The accused in this case just picked a stone and threw it in the direction of the deceased. The charge sheet alleges that the accused threw a brick at the deceased. The evidence led from State witnesses was that the accused did not throw the brick but held the brick and he struck the deceased once with it on the head. The conflict between the charge and the evidence was not resolved by the State.

The circumstances of this case show beyond question that the deceased was struck by the accused during an altercation in which the deceased was not the aggressor. The deceased was trying to defuse a volatile situation. There is no doubt that Violet and the accused were the main actors and were involved in an affray. The accused's emotions were clearly not in check and neither were those of Violet. The court does not find it necessary to resolve the issue of how the altercation arose. It is convinced on the evidence that the situation was volatile. It is difficult under the circumstance to hold beyond a reasonable doubt that the accused realised the real risk or possibility that death may result from his conduct and continued to engage in such conduct.

It must be pointed out that the law requires that the accused must realize a real possibility that death may result and not just a possibility. The accused's actions appeared to have been spontaneous. He recklessly threw the stone or brick without giving a thought as to where it landed. Section 49 of the Criminal Law Codification & Reform Act reads as follows:-

Any person who causes the death of another person negligently, failing to realise that death may result from his or her conduct or realising that death may result from his or her and negligently failing to guard against that possibility shall be guilty of culpable homicide.

The distinction between s 47 (1) (b) and 49 is a fine one. With respect to s 47 (1) (b) the test to be applied is subjective ,that is, whether or not the accused realised the real

risk or possibility that death may ensue from his conduct and continue to engage in such conduct despite the realisation of that risk or possibility

By contrast s 49 imports an objective test because it introduces the element of negligence. Negligence can only be judged against accepted norms and reasonable behaviour standards. The enquiry under s 49 (a) is, would a reasonable person in the circumstances which the accused found himself in have realised that death may result from his conduct. If the answer is yes and the accused persists in such conducts he commits the crime of culpable homicide. Under s 49 (b) the enquiry is, if a reasonable person would have realised that death may result from his conduct would he have guarded against the possibility of death. If a reasonable person would have taken steps to guard against the possibility of death and is shown not to have done so then he is guilty of culpable homicide.

Under s 49 (b) one envisages a situation where an accused creates a dangerous situation. Such person should take steps to guard against death arising from the dangerous situation that he would have created. This is not the position that obtains in this matter and the court will limit itself to a consideration of s 49 (a). In the instant case the totality of the evidence leads the court to conclude that the accused when he threw the stone or brick which hit or struck the deceased was negligent in failing to realise that death may result from his conduct.

The State has sought to persuade the court to consider the relevancy of the words uttered by the accused like, "I will kill you. Old man I will finish you", as indicative or relevant to the question of the legal intention to kill. The court is not persuaded that the utterances are relevant to the enquiry in the circumstances of this case in the light of the evidence led. Such words were spoken in the heat of the moment and they are not novel. Indeed a coward can utter such words. There are words which come out spontaneously and even people engaged in a boxing match can utter them. The court's assessment of the evidence of the witnesses was to take a cautious approach with respect to the evidence of Violet and Venna.

Violet and Venna have an interest to serve and would have reason to embellish their evidence since they are at the centre of the altercation that led to the loss of their father. They have a motive to want to see to it that the accused is found to have been to blame for the death of the deceased. On other hand the accused appeared to have rehearsed his evidence and dwelt on trivialities not relevant to the case or to his defence. He fared

badly under cross examination and presented an unbelievable account of events where he portrayed himself as a victim and not the aggressor and yet the probabilities point to him having been angered by what he had heard Violet and Venna discussing and naturally a person in his position would have been expected to react aggressively. The accused's account that he sought to leave the deceased's residence peacefully and was in fact the victim of the attack is so difficult to believe by any reasonable standards to the extent that the court found it to be so improbable as to be untrue.

The State on the other had did not in our view prove a case for murder beyond a reasonable doubt and in the circumstances the accused was proven to have acted negligently by reasonable standards in striking the deceased with the stone as he says or with the brick according to State evidence. Exhibit 5 the piece of brick was admitted by consent and in our view it is not material for the court to make a distinction as to whether a brick or a stone was used to strike the deceased. Be it a brick or a stone what was proved was that whatever weapon could have been used caused severe injury to the deceased's head's from which the deceased died. The accused's warned and caution statement exh 4 also shows that the accused acted negligently. He simply picked a stone and threw it intending to hit Violet yet the deceased was within the same vicinity of Violet. He did not check or care as to where the stone would land.

In the courts view this was negligence at its highest level. This is not a deflected blow situation as argued by the State but sheer gross negligence. In the court's view the case is really borderline between a contravention of s 47 (1) (b) and s 49 (a) of the Criminal Law(Codification& Reform) Act. In that regard the court gives the benefit of doubt to the accused person. The court's verdict therefore is as follows:

The accused is not found guilty of murder. The court enters a verdict of guilty to culpable homicide in contravention of s 49 (a) of the Criminal Law (Codification & Reform) Act (*Chapter 9.23*).

SENTENCE

The accused has been convicted of a serious offence in terms of s 49 of the Criminal Law (Codification & Reform)Act. The offence of capable homicide attracts a sentence of life imprisonment or any shorter term of imprisonment or a fine or both. It is clear that when the legislature provided for a sentence of life imprisonment it views the offence in a very serious light.

The correct approach to sentencing in such a matter is for the court to consider the accused's degree of moral blameworthiness. This can only be properly be appreciated by the court taking into account the degree of negligence exhibited by the accused. This court has already made a finding that the degree of negligence shown by the accused was of a very high level. It was also the finding of the court that this case was border line between murder with constructive intent as defined in s 47 (1) (b) and culpable homicide as defined in s 49 (a) of the Criminal Law (Codification & Reform) Act.

Section 48 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 protects as a fundamental human right, the right to life of every human being. Human life should only be taken away lawfully or by an act of God. In this case death could easily have been avoided but for the accused's lack of respect for his in law the deceased. In a normal traditional setting a son in law respects the father in law and will not even exchange profanities with him. To compound matters the offence took place not at the accused's residence but at the in laws residence. It just showed the character of the accused in having the boldness to go to the in laws place and cause commotion there. He was not even persuaded to relent from what he was doing. Despite being asked to come back on the following day to discuss his grievances, he just would not listen and was intent on causing havoc.

The accused's legal counsel that the court should take into account the fact that the accused felt hurt by the revelation that he was not the father of the boy child whom he thought was his. Although the court did not make a specific finding on whether or not Venna & Violet had actually engaged in that conversation the court takes the view that even if that conversation had been engaged in the answer to that should not have been the accused turning violent. There are accepted norms of reaction and behaviour in circumstances where a spouse discovers that he has not fathered a child whom he thought was sired by him. The matter should be talked over between the spouse's families. In fact, dialogue was what the deceased advocated for to no avail.

When one pictures the events of the day in question there is no doubt that the accused did not behave as what a reasonable son in law would have been expected to behave. An exemplary son in law will not resort to violence at the homestead of his father in law. The court accepted that the accused did not give a hoot as to where he was. He just thought that he could just behave in any manner that he wanted to as the prosecutor has properly submitted. Not only did the accused seriously injure his father in law, he had the

audacity to come back and cause distraction to the in laws property and to threaten the mother in law. His actions show an inherent wickedness in him. He is in fact a person of violent disposition. There was evidence adduced in this court that he had previously attacked his wife and in fact the reasons for the breakup of his marriage and for being at loggerheads with his in laws was because of his violent disposition.

It is clear that he deserves of a sentence that we will not only deter him but one that will deter other likeminded persons. It is a principle of sentencing that the courts should not pass sentences which are repulsive to society in their leniency or severity. In this case the question is to ask whether society would in the circumstances of what took place and what the accused did consider that a non-custodial as submitted by the defence counsel would meet the ends of justice . It has been suggested that the court should consider community service. There is no doubt that such a sentence will be inappropriate in this case and would send the wrong signals to the society. It would be a sentence that the society would frown upon and it would have the effect of society losing confidence in the criminal justice system.

The accused is a first offender. His personal circumstances have been taken into account. There is nothing in them that is extra ordinary. He is married, with a wife and siblings and other persons who look to him for their livelihoods. This is common place with almost everyone. Whilst accepting that the accused struck the deceased in the heat of the moment as submitted by his legal practitioner, it must be pointed out that the accused was largely the author of the incident. From his evidence it is him who first clapped Venna. According to his evidence, it was after that clap that the situation got out of hand. The accused is the one who started and caused the physical confrontation. The confrontation had been verbal but the application of force was initiated by the accused.

The accused was also injured somewhat in the scuffle from what he told the magistrate at the confirmation of the accused's warned and cautioned statement. Looking at those injuries and what he told the court about his feeling as though a needle had pricked him when he was hit by a piece of rubble, stone or brick by Violet, his reaction was not proportionate to what had been done to him. Under the circumstances, it is clear to the court that the accused's conduct deserves of extreme censure. He just acted as a bully on the day in question.

An appropriate sentence is a lengthy custodial sentence with portion suspended in the hope that when he re-joins society he will reflect on his actions and be deterred from engaging in violent conduct. The accused is sentenced as follows:

14 years imprisonment of which 3 years imprisonment is suspended for five years on condition that during that period he will not be convicted of any offence involving the use of violence for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, for the State
Matiznadzo & Warhurst, accused's legal practitioners