

THE STATE
versus
FARAI KAPENGA
and
INNOCENT KAPENGA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 27, 30 & 31 October 2017 & 1 November 2017

ASSESSORS: 1. MR RAJAH
2. MR CHAGONDA

Criminal Trial

J. Chingwinyiso, for the State
H. B.R Tanaya, for the 1st Accused
C. Chibaya, for the 2nd Accused

HUNGWE J: The accused faced a charge of murder. It is alleged that on 14 April 2017 at Samakande Village, Chief Katerere, Nyanga, 1st and 2nd accused both and each, or one or other of them unlawfully caused the death of Kizito Bulawayo by tripping him to the ground, punching him with fists several times on the face and striking him thrice on the head with a mattock with intent to kill him or realizing that there was a real risk or possibility that their conduct, might cause death and continued to engage in that conduct despite the risk or possibility, resulting in injuries from which Kizito Bulawayo died.

The State Outline is set out in exhibit 1, which is part of the record. I will not repeat it here. I will set out in details, the defence outline given by both the accused. 1st accused's defence was that he was acting in defence of his nephew, 2nd accused. To give a factual basis to that defence, he stated that around 1900 hours on the day in question he heard his sister calling him and alerting him that the deceased and Ward Bhuruwayo ("Ward") were assaulting 2nd accused. He rushed to the scene and found Ward sitting astride the 2nd accused. He was assaulting him with fists. The deceased held a source of light as he also kicked the 2nd accused who lay prostrate under Ward's

weight. The 1st accused tried to push away Ward unsuccessfully and he says that the deceased then turned on him and grabbed him. In the tussle that followed, 1st accused was overpowered. He ran back home. Determined to rescue his nephew, who is 2nd accused, he looked for a weapon with which to scare away the two men. He picked up a mattock and then went back to the scene.

Upon getting to the scene 1st accused found them still assaulting the 2nd accused. When deceased saw the 1st accused he approached him. Although he was now armed with a mattock, 1st accused says that the deceased menacingly kept on coming. He was then forced to swing the mattock which struck the deceased in the head. Only a second blow of the mattock to the head fell the deceased to the ground. 1st Accused then turned his attention to Ward who he struck on the back. Ward then turned on 1st accused. 1st accused hit Ward on the head. 1st accused says that at that stage, Ward grabbed the mattock and a tussle followed. He managed to wrestle the mattock away from Ward and ran away from the scene. He testified that he threw away the mattock and went home.

Soon afterwards 1st accused states that 2nd accused arrived home staggering. He reported to him that the two brothers had assaulted him. Clearly, according to 1st accused, 2nd accused was oblivious to the fact that it was he, the 1st accused, who had rescued him from the jaws of imminent death by the two brothers.

According to 1st accused Tongai Lovemore Kambadza (“Tongai”) later arrived. He advised them that the deceased was been badly injured. 1st accused heard Ward shouting threats towards him. As a result, he together with the rest of his family decided to put up for the night in the bush. This was not before he had instructed Edwin Chingaipa to go and pour water over the deceased. That was his defence outline.

The 2nd accused’s defence outline went as follows. He gave the background to the tragic incident as being that the deceased’s wife had assaulted his mother on 2nd of April 2017 over allegations of extra-marital liaison with the deceased. The matter had been reported to the police. Following upon this report, the police asked the deceased’s wife to pay a deposit fine. On 14 April 2017 around 1900 hours, he went to the toilet. Upon emerging from this place, he saw some light from a nearby footpath. There were voices emanating from this scene. He asked who was out there, as he approached the scene. Second accused states that he identified the deceased and Ward. They both appeared to be drunk. The two brothers advised him that they had come to collect the

US\$20.00 fine, which the deceased's wife had paid to police. They wanted this US\$20.00 from him and his mother. The 2nd accused responded that Sarah Kamanga who is the deceased's wife had paid the fine for assaulting his mother to the police and not to his mother. As such, neither his mother nor he would be in a position to pay or refund them of this \$20.00. According to 2nd accused, this response angered them and they commenced an assault upon his person.

As he tried to escape from the assault, Ward grabbed him by the shirt, lifted him off the ground and then throwing him back to the ground. His shirt was torn in the process. The two continued to assault him until he lost consciousness. He does not know what else happened thereafter. He only later learnt that what had happened from his co-accused, the 1st accused. He says that 1st accused told him that he had struck the deceased on the head with the mattock and that the deceased had died. He believes that it was because of this that the deceased had died. He denied being criminally liable for the deceased's death.

The State case followed the evidence of two crucial witnesses who are Ward Bulawayo and Tongai Lovemore Kambadza. Ward is the younger brother of the deceased. He testified to court that he had been walking home with the deceased from Avilla Business Center. They were discussing their family issues. Prior to this day they had enjoyed good relations with both accused's families. They are related in that he considers 1st accused as his brother-in-law. He had actually gone to meet and greet 1st accused when 1st accused arrived from Harare earlier on that day.

On this particular evening, the route that they had taken passed near the 2nd accused's residence. 1st accused's residence is further away from the 2nd accused's. The 2nd accused then approached the deceased. 2nd accused asked why the deceased's wife had assaulted his mother. When he turned to see what was going on between his brother and the 2nd accused, he says that the 2nd accused tripped his brother, the deceased bringing him down. The 2nd accused then sat on deceased's chest as he commenced an assault on the deceased. His reaction was to safely put down some sadza that he had bought at business center before turning on the 2nd accused to restrain him from perpetrating an assault on the deceased. In doing so, he grabbed the 2nd accused and implored him not to assault the deceased since the matter was with the police. As he struggled to remove the persistent 2nd accused from sitting upon the deceased, the deceased had asked that he be allowed to call the police and advise them that he was being assaulted for the matter which the police were handling.

According to Ward, 2nd accused was showed such determination that to assault the deceased that it was virtually impossible to restrain him. At that point in time, the deceased, despite being under attack, continually implored Ward not to assault 2nd accused. As he was struggling with the 2nd accused, Ward testified that 1st accused arrived. He was armed with what later turned out to be a mattock. He struck the deceased who was still laying on the ground trying to call the police. The movement of the weapon was a downward swing to the head. Soon after the deceased fell down, he then felt a blow to the back of his head. This blow by the 1st accused on him had the effect of loosening his grip on the 2nd accused. He fell down.

When Ward fell down, the 2nd accused turned his attention to the deceased. He began to kick the deceased using his booted feet. The 1st accused continued to assault Ward with the mattock by striking him on the back and abdomen. Sensing danger, Ward testified that he thrust his head between the 1st accused's legs. The 2nd accused then later came on and joined 1st accused in assaulting him. By this time the deceased was laying still and prostrate on the ground. He told the Court that the assaults only stopped when Tongai arrived.

According to this witness, Tongai successfully restrained 1st accused. He took the two assailants to their residence. He noticed when all was said and done that his brother was still laying prostrate. When he called out his name, he got no response except for a groaning sound indicating that he was in pain. Ward decided to rush back to the business center to get help for his brother. When he came back with the police constabulary he found a bucket of water and a pair of shoes nearby. They both, with Tongai's assistance, conveyed the deceased first to the business center in a wheelbarrow and finally by a motor vehicle to the hospital. The deceased was pronounced dead on arrival at the hospital.

Ward says that the deceased cautioned him not to assault the 2nd accused after he had removed the 2nd accused from atop the deceased. According to ward, the deceased, who had been a member of the neighborhood watch committee since 1991, did not want to spoil his reputation. He was a stickler of the law.

This version of events is corroborated, in its material respect, by the testimony given by Tongai. Tongai is related in essence to both accused as well as the deceased and the first State witness. He further testified that when the commotion began, he was not sure whether it was one of distress or of joy. It was his wife who urged him to go out and establish what was going on out

there. As he walked up to the scene, suddenly the noise died down. He stopped. He then heard the sound of someone being assaulted. He then rushed to the scene. Upon arrival he lit his torch and saw someone being struck with a mattock. It turned out it was the 1st accused assaulting the witness Ward. Nearby there was another body laying on the ground. He successfully restrained the 1st accused who wielded the mattock from further assaulting Ward. He did so by coming from behind and holding 1st accused by the waist thereby restraining him from further assaulting his victim. He pushed 1st accused towards his residence. At that stage, he saw 2nd accused, his wife Chipo Chitonje and Edwin Chingaipa arrived at the scene. With the assistance of these new arrivals, they managed to take the 1st accused together with his mattock to his residence. He did not enter the premises of both accused, but went back to check on the body which he had noticed laying on the ground.

Upon arrival, he observed there was nobody at the scene besides the deceased. He called out the deceased, but got no response. He then went back to advise both accused that they had seriously injured the deceased who was in urgent need to medical attention. He asked them both for their help. Instead the two accused, responded that the deceased was not seriously injured but merely unconscious. They suggested that Edwim Chingaipa should go and pour water over the deceased. Without their cooperation, the witness decided not to visit the scene but to retire to his residence. As he did so, he got a visit from the police constabulary who had asked for his wheelbarrow with which to ferry or to convey the deceased to the business center. He then joined the crew that helped to convey the deceased to Avilla Business Center where the deceased was conveyed by a motor vehicle to a clinic.

This witness was adamant that he saw the 1st accused attacking Ward Bulawayo with a mattock. At this point in time only the deceased, Ward and the 1st accused were at the scene. He said that it was after he had restrained the 1st accused from further assaulting the witness Ward that Chipo Chitonje and Edwin Chingaipa arrived together in the company of the 2nd accused. They walked the 1st accused back to their residence. He maintained that at that stage he could tell that none of the accused was injured. He insisted that the 1st accused carried his mattock to his residence.

The issue of the accused's guilt will depend on whether this court is persuaded to believe the State witness version or that is given by the two accused in relation to what took place on this

fateful night. I make this observation because the two versions are mutually exclusive in almost every material respect. In other words, the court's view is that credibility in this matter will be decisive factor upon which the decision of this court will hinge.

In assessing the credibility of witnesses the court generally is guided by several factors. A variety of factors must be taken into account in assessing a witness's credibility. In the civil case of *Hees v Nel* 1994 PH F11 MAHOMED J, had this to say on this subject of assessment of credibility,

“Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony which often is a relative condition to be compared with the quality of the evidence of the conflicting witness. His consistency both within the context and structure of his own evidence and with the objective facts, his integrity, his candour, his age, his capacities and opportunities to be able to depose to the events he claims to have knowledge of. His personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability to effectively to communicate what he intends to say and the weight to be attached and the relevance of his version against the background of the pleadings.”

Between the two versions given by the witnesses, the court, after a careful assessment of the witnesses' testimony, prefers that version in which there is independent corroboration from outside the combating parties. We find that Tongai's evidence does provide the corroboration of the evidence given by Ward in material respects. In fact, Tongai's evidence fills in the gaps which are apparent in both Ward and the accused's versions.

Tongai heard the noise from the direction of the scene. When he got to the scene he found the 1st accused striking Ward with a mattock. He restrained the 1st accused by holding him from the back. Deceased was laying prostrate on the ground nearby. He testified that the 2nd accused was not present. What Tongai's evidence does is to explain away why the 2nd accused is unable to describe how the assault on Ward proceeded as he was not present. Once 1st accused struck Ward Bulawayo on the head with the mattock forcing him to release 2nd accused, it would appear to us that 2nd accused left the scene. Thus when Tongai arrived he did not find 2nd accused present at the scene. 2nd accused only arrived when Tongai had brought the situation under control. Tongai also speaks to a point in time when the noise died down.

In our view, and in our assessment of the evidence, this must be seen in the context of what Ward Bulawayo says took place. He says that before the 1st accused arrived, the deceased was

shouting to him not to assault the 2nd accused as he intended to call the police. The 2nd accused was questioning the deceased why his wife had assaulted his mother. We find that this must be the noise to which Tongai adverts to when he said that there was noise coming from the scene.

Ward testified that 2nd accused was quite determined to assault the deceased. We find that it was during the struggle between Ward and the 2nd accused that 2nd accused's shirt was torn. Ward was pulling 2nd accused from the deceased. 2nd accused resisted this effort which was directed at extricating the deceased from the clutches of the 2nd accused. Ward had not succeeded in his effort when 1st accused arrived. Upon 1st accused's arrival, 1st accused struck the deceased with the mattock causing him to fall to the ground again. This is the thud that attracted Tongai. This heavy fall was then followed by silence. 1st accused then turned on Ward striking him with the mattock. That blow caused Ward to release 2nd accused who then left the scene. The blow was also heard by Tongai, who then rushed to the scene as it was apparent to him that someone was under attack. 1st accused delivered the second blow of the mattock upon Ward when Tongai was able to see what was taking place. Tongai testifies to a moment when there was silence. He then ran to the scene. Upon arrival, he found the 1st accused striking Ward. The deceased was laying on the ground. He did not see the 2nd accused. In our assessment of the evidence, and in all probability, by then the 2nd accused had left the scene.

According to Ward, who impressed us as a reliable witness in spite of his interest in the case, 2nd accused initiated the assault on the deceased. 2nd accused had the motive in that he detested the presence of the deceased in his mother's life. To this end, he had raised this subject with the deceased. He had also queried why the deceased's wife had assaulted his mother. The query degenerated into an assault upon the deceased. All this occurred in the sight of the woman in the middle, 2nd accused's mother. Ward's intervention appears not to have been anticipated in either its pacifying role or in its neutralizing role. 2nd accused's mother, for her own reasons, called upon 1st accused to come to 2nd accused's aid. It is not clear what role she anticipated 1st accused would play but his involvement appeared to further aggravate an already bad situation.

Contrary to 1st accused's claim, 1st accused came armed with a mattock. We make this finding in light of the probabilities of this case. It is highly unlikely, and would have been unusual, that having been advised by his sister that his nephew was under attack, he would join the fray unprepared. He intentionally and purposefully armed himself with the patently dangerous weapon

and attacked the deceased by directing the mattock to the head. We find that the 1st accused was untruthful when he denied directing the mattock blow to deceased's head. If this were so, how then, one would wonder, would he be sure that he was targeting the right person? It must be appreciated that at that stage his nephew whom he had come to rescue was still locked in a tussle with Ward and the deceased.

Clearly, although it was dark, one could see who was where as long as they were close to the subject, Ward told this court. 2nd accused maintained, as did 1st accused, that the two brothers initiated the fight when deceased slapped 2nd accused. We find it highly unlikely and improbable that the deceased would set out together with his brother to assault his girlfriend's son. On the other hand, the probability of the case point in the other direction. Both accused were not happy with the deceased's relationship with Lillian Kapenga. They would be the most likely the party to initiate an assault on the deceased as stated by Ward. Consequently it is our finding that they did.

Whether the defence of private defence is available to the accused

At common law, in order for a situation of private defence to arise, there must be evidence that the defence was necessary to avert the attack; a reasonable response to the attack; and directed against the attacker.

These requirements have been set out in s 253 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] ("Criminal Law Code"). These can be summarized as follows:

- a) The attack must have commenced or was imminent;
- b) The accused's conduct was necessary to avert the unlawful attack or he could not otherwise escape from or avert that attack;
- c) The means used to avert the unlawful attack were reasonable in all the circumstances;
- d) Any harm caused by his conduct was caused to the attacker and not to the innocent third party.

The question whether an accused can successfully claim the defence of private defence is determined by examining objectively the nature of the attack and defence to determine whether they conform to the principles of law that are set out above. This means that each requirement of the attack and defence must be judged from an external perspective rather than in terms of the accused's perceptions and his assessment of the position at the time he resorted to private defence.

In applying this test the court must be careful to avoid the role of an arm-chair critic, wise after the event, weighing the matter in the secluded security of the court-room. Instead the court must adopt a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence. See *S v Ntuli* 1975 (1) SA 429 (A) @ 436D

Similarly, s253 (2) of the Criminal Law Code requires this court not to take an armchair approach when assessing the circumstances in which the defence is raised. The Court is implored by the Act to appreciate and understand the circumstances of an accused who raises this defence. As I have tried to demonstrate above, the version given by both accused is littered with out-rightly misleading and untrue statements of fact. We do not believe that the 1st accused would have joined the fray unarmed when he was seen by a witness strike someone with a mattock. The 1st accused stated in his defence that he had decided to look for a weapon when it became clear that he would not rescue 2nd accused without resort to a high degree of violence. We, however, are not persuaded that there was a time when 1st accused left the scene of crime to go and look for a weapon and accidentally came across the mattock. It would have been strange for him to have left his nephew under attack just to look for a weapon.

It is the 2nd accused, according to the evidence, who accosted the deceased. When he assaulted the deceased, Ward came to deceased's rescue by engaging 2nd accused in a bid to separate 2nd accused from the deceased.

When the 1st accused came to the scene, the deceased was not assaulting anyone nor did he pause any danger to either the 1st or the 2nd accused. On the contrary the deceased was cautioning Ward against assaulting the 2nd accused. When the deceased was attacked we are unable to say that the attack was in defence of the 1st accused himself or the 2nd accused. The threat had long been dealt with by the deceased himself who had cautioned Ward Bulawayo not to assault the 2nd accused. Ward was the only person present at the time.

When Tongai arrived, 2nd accused was no longer present. By that time, however, the fatal blows had been delivered. Tongai had not witnessed these but had heard the sound of such blows and saw the deceased laying on the ground upon arrival. The account given by Tongai confirms and corroborates Ward Bulawayo's evidence. Consequently, we find that 2nd accused had associated himself with the 1st accused for the purposes of perpetrating an assault on the deceased. This is why, despite the fact that the 1st accused found the witness Ward assaulting the 2nd accused,

the 1st accused went for the deceased rather than Ward who was assaulting the person that had he come to rescue. Clearly, therefore, the 1st and 2nd accused were determined on assaulting the deceased. After he was struck down with the mattock, 2nd accused kicked the deceased further. He could not have been acting in self-defence when he did so. Such conduct in our view, provides sufficient evidence that the 2nd accused approved of and associated himself with the fatal attack which the 1st accused had already perpetrated on the deceased. At that stage 1st accused was assaulting Ward when the 2nd accused was kicking the prostrate deceased. In our view, both accused cannot escape criminal liability for the death of the deceased.

Mr Chibaya, for the 2nd accused, challenged the applicability of s 196 of the Code which deals with the liability of co-perpetrators. Section 196 A deals with this situation in some detail. It provides as follows::

“If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime whether by virtue of having the intention to commit it or the knowledge that it would be committed or the realization of a real risk or possibility that a crime of the kind in question will be committed, then they may be convicted as co-perpetrators in which event the conduct of the actual perpetrator even if none of them is identified as the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

As I have tried to demonstrate, the evidence before the court is that it was the 2nd accused who initiated the assault. 1st accused was called in by his sister. He obliged by bringing in a lethal weapon. At the stage when the deceased had been felled to the ground, 1st accused had not yet joined in the assault. He was persuaded to join in by his sister. The decision to arm himself with a mattock was entirely his. Ward saw him strike the deceased upon arrival. Ward states that at that stage the deceased was laying down trying to call the police. As the 2nd accused was present, he must have seen this attack which was in furtherance of his purpose. He did not discourage the 1st accused from the use of the mattock. Both accused must have realized that if applied to the head, the result would be death, but notwithstanding that realization, they both continued with the assault on the deceased.

The 1st accused struck the deceased's head with a mattock not once, but twice. The 2nd accused initially used his fists, but later on after the mattock blow to the head had been delivered,

used his booted feet to attack the deceased. In our view both ought to be found guilty of murder as defined in s 47 (1) (b) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

MITIGATION

Mr Tanaya: In mitigation for the 1st accused person we submit that the accused person is a 32 year old first offender who should be treated with due lenience. To the extent possible given a sentence that accommodates rehabilitation in due time.

He is married with two minor children also looking after two of his nephews. He has already lost his job when he got incarcerated the first time. The offence was unpremeditated. Here is the man who left Harare for the village hopping it to be an ordinary holiday. He was called by his sister to assist a situation and ended up committing an offence. We also note that the deceased was a relative to the accused person. So he feels the pain that the community or society feels given the close relationship that was there between him and the now deceased. There was no bad blood between them. As a result, he feels badly about it and he has tried to make amends with the deceased's family as he testified in the witness stand.

The offence was also committed in the dark. I appreciate that he was reckless in the manner that he committed the offence. But we urge the court to distinguish an offence committed in broad day light and where an assault was done in the dark in mitigation. He admitted assaulting the now deceased. He did not waste the court's time in that regard. The question was simply the legal... and fact. He did not even hide the fact that he had used the mattock. The mattock was not recovered. It is not there, but he confessed himself to the police when he surrendered himself to the police and that corroborated with the State in gathered evidence for his own prosecution.

He has already suffered rejection by his relatives as indicated by the fact that his family was send away from the now deceased's funeral. That is psychological punishment which will remain with him for the rest of his life.

In the circumstances I would urge the court to impose a sentence in the region of 10 years imprisonment. Unfortunately, it seems like I have misplaced the relevant case law that I have, but I would urge the court to consider a sentence in that region by not more often than not offences of murder with constructive intent end up with sentences around the region of 20 years. But given the mitigatory factor that we have raised and especially the fact that this was not premediated

murder. This is somebody who came to help and helped very wrongly. We pray that the court should temper justice with mercy my lord and gentlemen assessors.

Mr Chibaya: My lord and gentlemen assessors, in mitigation for the 2nd accused we submit that he is a first offender. He is 22 years old and at the time that the offence was committed he was 21. We also submit that the murder was not committed in aggravating circumstances as it was not committed in the course of yet another crime like robbery. The murder was not premeditated. The accused person was in custody for a month before he was released on bail. He also surrendered himself to the police.

He is married and has two minor children. He was employed at an Econet outlet. That is all my lord.

ADDRESSES ON AGGRAVATION

Mr Chingwinyiso: Here is yet another life that was lost unnecessarily.

Mr Tanaya: With your indulgence my lord and gentlemen assessors if you could allow, I have found a case that I had referred to earlier on. It is the case of *S v Malundu* HC 68/15. That was a case where the accused had assaulted the deceased with a rubber button stick on the head resulting in death and was found guilty of murder with constructive intent and sentenced to 10 years imprisonment. In that case reference was made to *S v Gatsi* SC 37/1990 where a wife had poisoned her husband in retaliation for some brutal assault and was given 8 years imprisonment.

Mr Chingwinyiso: Like I said he was yet another life that was lost unnecessarily in a matter that was within the hands of the police, the issue of assault on Lilian Kapenga by Sarah Kamono the deceased's wife. The crime of murder my lord and gentlemen assessor is regarded as being a very serious offence that carries with it death penalty.

This court has properly found that the 1st accused person came armed and his intention was not to save the 2nd accused person but to commit this particular crime. And the deceased must have died a very painful death when he was struck by a mattock twice in the head. It is also aggravating that this is an offence that involved people who are related who were supposed to have sat down as a family and discuss the issue that was the root cause of this particular offence. But the accused person chose otherwise and took the law into their own hands. The issue of the accused persons giving defences that were earmarked to cloud the case, the court's view and vision of what actually transpired is aggravatory. Instead of coming out clean, they decided to waste time by

trying to hoodwink the court by giving out versions that are not comprehensive. Therefore, they were not contrite.

We submit my lord and gentlemen assessors that the issue of sentence is primarily within the discretion of the court despite other cases that my learned friend had cited. The Malundu case, there is the issue of a button stick, the Gatsi case is that of a woman poisoning another. These are distinguishable from the case at hand and therefore the sentence that were passed within these cases ought to be distinguished from what this court ought to give.

We are of the view that a sentence within the range of 15 years will be most appropriate for the loss of life to the deceased. Thank you my lord and gentlemen assessors.

SENTENCE

HUNGWE J: In assessing your sentence I will take into account what your learned counsel has said in your favour on your behalf. I must express the court's gratitude to both Mr Tanaya and Mr Chibaya. That is all that anyone could have said in a case like this. I make this observation in light of the fact that we found that in fact there are more aggravating factors than their mitigatory ones. This is because the assault on the deceased was most brutal especially if regard is had to the fact that the deceased was at the time peacefully going about his business. He had neither provoked nor done anything to provoke a situation where such an assault could, in any way, be justified. The assault left him almost dying soon afterwards. When he was eventually taken to the clinic he was already dead.

One is not surprised by this because the description of the mattock that the 1st accused wielded leaves one in no doubt that it is a dangerous weapon, if it is used with force to the head, Ward Bulawayo must count himself lucky because the blow to the head only managed to graze his forehead. In any case the assault on him does not form subject of this trial and therefore we do not put any weight on that assault on Ward Bulawayo.

But the findings by the doctor which are set out in exhibit 5 demonstrate the seriousness of the use of such a weapon because Doctor Jokiro says that he found a fractured base of skull which is consistent with the application of such a weapon to the head. The brutality of the attack in our view, aggravates this case. When one listens to the evidence, one finds that there was no reason for the attack on the deceased. What also makes the matter even worse is the fact that he then

sought to pull wool over the court's eyes about what transpired. Fortunately, the witness's evidence was clear, and as such, the court to see what really took place.

Murder is a serious crime for obvious reasons which we have consistently stated in this court. It will serve no purpose for me to emphasis the sanctity of human life. It is made worse where it is committed in circumstances where there exists apparently no justification for it. The courts are enjoined to pass a sentence that sends the correct message to the community. The message is that society abhors this type of crime.

One would have some sympathy to the fact that the 2nd accused is a young man aged 22 years. But the fact that it is him who initiated this tragedy places him in a situation where he ought to be treated just like the 1st accused. I say this because had it not been because of his over zealousness in interfering with his mother's private life, probably the deceased would still be alive.

In all the circumstances of this case, the following sentence in our view is appropriate.

You are each sentenced to **18 years imprisonment.**

*National Prosecuting Authority, State's legal practitioners
Mugadza Chinzamba & Partners, accused's legal practitioners*