

THE STATE
versus
PINIEL TINOMUDA TAGARA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 28 & 30 March & 31 May 2022

ASSESSORS: Mr Barwa
Mr Chakvinga

Criminal trial

Ms *L Masango*, for the State
Ms *Y Chigodora* with Ms *R R Mutindindi* for the accused

MUREMBA J: The accused is facing two counts of murder as defined in s 47 (1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). It is not in dispute that on 13 October 2020 at No. 10, Village 43 Hoyuyu, Mutoko he caused the death of Lizzie Madende by striking her with an axe once on the head just above the left ear and once on the forehead thereby causing injuries from which Lizzie Madende died on the spot. It is also not in dispute that on the same date, time and place, the accused struck Benhilda Nyarambi with the same axe once on the left collar bone and once on the back of the head thereby causing injuries from which Benhilda Nyarambi died three days later.

Before trial commenced and as the accused's counsel was trying to get instructions from the accused in order to prepare the accused's defence outline, the accused told her that he did not remember what transpired on the fateful day as he had suffered a blackout. The accused indicated that this was an ailment that he had suffered from since he was young. Because of this, the court ordered that the accused be examined by doctors in terms of the Mental Health Act [*Chapter 9:23*] in order to ascertain whether the accused was mentally disordered at the time he allegedly committed the offences. Unfortunately, the doctors' reports simply indicated that the accused was well oriented in place, time and person and that he was fit to stand trial.

The reports did not speak to the accused's mental status as at the time he allegedly committed the offences on 13 October 2020.

The accused did not dispute the findings by the doctors, but he stuck to his defence of temporary insanity at the time he struck the two deceased. The matter proceeded to trial with the onus on the accused to prove his defence on a balance of probabilities in terms of the proviso to s 18(4) of the Criminal Law (Codification and Reform) Act. This proviso provides that:

“Provided that where an accused pleads that at the time of the commission of a crime, he or she was suffering from a mental disorder or defect as defined in section *two hundred and twenty-six*, or a partial mental disorder or defect as defined in section *two hundred and seventeen*, or acute mental or emotional stress, the burden shall rest upon the accused to prove, on a balance of probabilities, that he or she was suffering from such mental disorder or defect or acute mental or emotional stress.”

The accused pleaded not guilty to the charge. In his defence outline he said the following. On 13 October 2020, he had suffered a blackout and found himself holding a bloody axe with the deceased persons lying on the ground. He did not recall striking anyone of them with the axe. He has always suffered from mental instability from childhood and would have seizures at times and had been treated by traditional healers. He said that he would have periodic bouts of mental instability. He said that on the fateful day, he questioned the first deceased Lizzie Madende who was his paternal aunt about the whereabouts of his traditional medicine known as Chifumuro as she was the one who had moved the tyre in which the medicine was. He then threatened to assault her should she fail to give him the medicine. The accused said that he recalled that the two deceased persons then went away for some few minutes and returned home. They tried to open the door, but he did not recall what happened after that as he suffered a blackout and only regained appreciation of events after the incident when he realized that he was now wielding a bloody axe. He said that he tried to commit suicide, but was restrained by on-lookers. The accused denied intentionally causing the death of the two deceased persons and denied any criminal liability. He said that when he struck the deceased persons, he had completely lost control of his mental faculties to the extent that the factual basis of the allegations had to be explained to him.

The State's Evidence

The State produced the following exhibits by consent. Exhibit 2 was the post mortem report for count 1 in respect of Lizzie Madende. The cause of death was concluded as

“laceration on the head, compound fracture, left temporal region of skull, hemorrhagic shock secondary to assault.” The deceased was 59 years old.

Exhibit 1 was the post mortem report for count 2, in respect of Benhilda Nyarambi. The cause of death was concluded as “severe head injury secondary to assault.” The doctor noted that the deceased had a 10cm laceration on the head and a 10cm laceration on the left collar bone. The deceased was 81 years old.

Exhibit 3 was the axe and Exhibit 3B was the certificate of weight and height of the axe. The weight was 1.23kgs. The axe blade measured 8.5cm wide and the length was 25cm. The handle measured 75cm long.

Exhibit 4 was the accused’s confirmed warned and cautioned statement in respect of Count 2. In that statement which was recorded on 29 October 2020 the accused said:

“I admit to the offence. On the 13th day of October 2020 at about 2000hours, I struck the now deceased Benhilda Nyarambi with an axe. I do not clearly know the reason which caused me to strike the now deceased. I threw the axe towards the now deceased and it struck her on the head. It fell on the left side of the neck thereby injuring her and she fell on the ground.”

Exhibit 5 was the accused’s confirmed warned and cautioned statement in respect of Count 1. In that statement which was recorded on 14 October 2020 the accused said:

“I admit to the offence. On the 13th day of October 2020 at about 2000 hours, I struck the now deceased Lizzie Madende with an axe once above the left ear and she fell on the ground. I struck her again once on the forehead and she died instantly. She had caused me not able (*sic*) to pick up my traditional herb which I had dropped.”

The evidence of Chiedza Madende, Gilbert Mukanya and Christopher Muzuva was formally admitted as it appears in the State’s summary of evidence in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA). The evidence is quoted hereunder as it appears in the State’s summary.

“**Chiedza Madende** is a female juvenile who will attest that accused is her uncle and deceased one was her mother whilst deceased two was her grandmother. They all resided together. She will state that on 13 October 2020 she was with deceased one and two and Isheanesu Mudhuba at home whereby they were coming from fetching water. The accused was asleep in his bedroom. Deceased one pulled down a worn out tyre that was by accused’s bedroom wall as they intended to offload the drums of water. Accused heard the sound of the tyre being pulled off and came out of his bedroom and confronted deceased one. Accused stated that he had hidden his traditional herb in the tyre and was therefore demanding it from deceased one. Deceased one told him that there had been nothing in the tyre. Accused went on to check the tyre physically and found nothing which then infuriated him. Accused then went on to threaten deceased one with an axe demanding his herbs back. Deceased one then threatened the accused by telling him that she would report him to the police if he dared attack her. The witness will state that she in the company of deceased one and two left home and stayed in a nearby bush hoping that when they returned home at a later interval the matter would be over. She will go on to state that when they returned home deceased one was attempting to unlock the door to

her bedroom whilst she was standing by deceased one's right side. Accused approached suddenly from the direction of the kraal, he picked an axe which was leaning against a Mutukutu tree in the yard and charged towards the deceased one and herself.

She will further state that upon noticing that accused intended to attack someone she moved slightly aside whilst deceased one was trying to move away. Accused struck deceased one with the axe once on the left side of the head above the left ear. Deceased one fell on the ground. Isheanesu Mudhuba then asked the accused why he was attacking deceased one whilst standing about 20 metres from where they were at the kitchen entrance. Accused threatened to assault Isheanesu Mudhuba who then ran away. The accused then returned to the spot where deceased one was lying still holding the axe. She will state that she together with deceased two screamed and deceased two pleaded with the accused to stop attacking deceased one. Nevertheless accused struck deceased one again on the forehead whereby deceased one died. She will state that the accused then turned to her intending to attack her but she fled and ran to Christopher Muzuva's homestead to seek protection. She left deceased two crying for help. She will state that she found Isheanesu Mudhuba at Christopher Muzuva's home having already reported what had taken place.

She returned home together with Isheanesu Mudhuba. She was informed that deceased two had also been attacked. She indicated the axe that had been used to attack deceased one to the police. On 26 October 2020 she was informed of the death of the deceased two.

Gilbert Mukanya: is a duly attested member of the Zimbabwe Republic Police. He will state that he only knows the accused in connection with this matter and had no prior knowledge of the deceased persons. He will state that on 13 October 2020 at around 2030 hours Wisdom Mavi arrived at Jani Police Base where he was on duty. Wisdom Mavi told him that he responded to a screaming woman from Plot 10 Village 43, Hoyuyu when he was passing by going to his homestead. The witness revealed to him that he found deceased one lying on the ground whilst deceased two who was still alive said "mwana wangu atemwa nedomo" meaning to say in English "my daughter has been struck with an axe". He will state that he proceeded to the scene in the company of Darlington Chawasema. At the scene he observed the body of deceased one lying on the ground and deceased's head was on blood-soaked soil. He went on to examine the body of the deceased one and discovered that there was one deep cut above the left ear and another deep cut on the forehead. The injuries were still oozing blood. The deceased had already passed away.

He will state that he also found deceased two lying on her stomach on the ground. The deceased was praying but was in pain, she had two deep cuts, one on the head and the other one on the left collar bone. The injuries were also still oozing blood. He will further state that he then found an axe on the ground between the two bodies. He therefore suspected the axe to be the weapon that had been used in the commission of the offence. He therefore took the axe and preserved it as an exhibit. He will state that he tried to interview deceased two but she could not respond and she ended up losing consciousness. Darlington Chawasema brought his vehicle and used it to ferry deceased two who was still alive to Mutoko Hospital. He went on to cordon off the scene with some barbed wire to ensure that no one interfered with the scene. He then called Sergeant Mavuka informing him of the incident.

On 14 October 2020 he inspected the axe for bloodstains but he however found none. He however found a track of the accused's shoe prints which he followed into a nearby bush where he found the accused hiding. He will state that upon questioning the accused he confessed to striking the two deceased persons with the axe. He went on to place the accused under arrest and recorded his initial warned and cautioned statement which he recorded in his police notebook. He also showed accused the axe and the accused confirmed that that was the axe he

had used in the commission of the offence. Sergeant Mavuka arrived in the company of others and he handed over the scene, the accused and the axe to him. Sergeant Mavuka went on to invite witnesses and the accused to make indications at the scene which they all did freely and voluntarily. He will state that the indications were done in his presence. The body of deceased one was then ferried to Murewa District Hospital. The accused was taken to ZRP Mutoko where his warned and cautioned statement was recorded and he also witnessed the recording.

On 15 October 2020 he will state that he accompanied Sergeant Mavuka to Murewa District Hospital where the remains of deceased one were examined by Doctor Gwisai who concluded that the cause of death was **laceration on forehead, compound on the left temporal region of the skull and hemorrhage shock secondary to assault**. This was captured in a post mortem report.

On 16 October 2020 he escorted the accused to Mutoko Zimpost in the company of Sergeant Mavuka where the axe was weighed and measured by Sunshine Mudzimurema. The axe handle weighed 1.23 kilograms. The axe blade measured 25 centimetres in length and 8.5 centimetres in width. The handle measured 75 centimetres long and a certificate of weight was issued to that effect. On the same date the accused was placed on remand.

On 26 October 2020 he will state that he was informed that deceased two had also passed away. He therefore accompanied Sergeant Mavuka the next day to Mutoko Hospital where Doctor Prince Mangwiro performed a post mortem on the remains of deceased two and concluded that the cause of death was severe head injury secondary to assault. On 20 October 2020 the accused was recorded another warned and cautioned statement by Sergeant Mavuka in his presence at Mutoko Remand Prison in respect of deceased two. The accused gave his warned and cautioned statement freely and voluntarily without any undue influence.

Christopher Muzuva: he is a male adult and will state that the accused is his nephew and that deceased two was his aunt. He will state that on 26 October 2020 around 1100 hours he was to accompany deceased two to Parirenyatwa Hospital to receive specialized treatment. They were being ferried by Darlington Chawasema. He will state that the deceased was suffering from injuries she had sustained during an attack by the accused on her with an axe. He will state that deceased two passed away whilst they were still on the way to Parirenyatwa Hospital. He called Sergeant Mavuka and informed him of the development. They were advised to take the body to Murewa District Hospital instead where he identified the body of deceased two to Sergeant Mavuka.”

The evidence of these three witnesses was not disputed by the accused. The State went on to lead *viva voce* evidence from three more witnesses, namely Wisdom Mavi; Isheanesu Mudhuba and Shadreck Mavhura. Their evidence was as follows.

Wisdom Mavi was a neighbour of the accused and the deceased persons. He had known the accused for about 20 years. The highlights of his evidence were that the accused suffered from epilepsy and would act in the following manner when under attack: urinating in the presence of people, including women; spitting hard over a distance of 5 – 8 metres; moving around making humming sounds and acting as if he was seeing something in front of him which he would be pointing at; and failing to appreciate that he had gone to fetch water and coming back without the water. The witness said that he had seen the accused under attack about five

times. He said that if the accused was attacked whilst doing something he would continue doing what he was doing until the attack was gone. If the accused was attacked whilst harvesting tobacco, he would remove all the tobacco leaves up to the stem. The accused would be very weak during an attack and in the witness' opinion, the accused would not be able to wield an axe. The witness testified that he had never witnessed the accused being violent whilst under an attack. He said that when the accused came back to his senses, he would not remember what would have transpired whilst he was under attack. People would have to tell him. The witness said that on the fateful day he had been called by the accused's grandmother, deceased two. She needed his help in talking to the accused who was said to be having problems with deceased one. However, the witness never got to know what the issue was all about, because when he got to the accused's home, deceased two said that the issue had been resolved and at that time the accused was in the field ploughing.

The witness confirmed that on the night of the same day after the accused had struck the deceased persons, he had attempted to kill himself with rat poison. The accused is said to have gone to the witness' young brother's home looking for rat poison. The witness said that the accused was arrested the following day in a nearby mountain where he was found by the police who were looking for him with the help of the members of the public. The accused was the first to see the people and the police and he called out to his uncle Muzuva saying, "Uncle Muzuva, I am here". When the police and the people approached him, the police gave Muzuva the handcuffs so that he would hand-cuff the accused. The accused did not say anything but simply stretched out his hands to uncle Muzuva for him to hand-cuff him. That is how the accused was arrested.

Isheanesu Mudhubha gave his evidence under the Victim Friendly System. His evidence was as follows. He is 16 years old. He was staying with the two deceased persons and the accused at the material time. The first deceased, Lizzie was his maternal grandmother and the second deceased was his maternal great grandmother. The witness said that he had stayed with the accused at this homestead for 6 years. He said that he had witnessed the accused under an epileptic attack on several occasions over the years. He said that when the accused was under attack, he would not talk to anyone and he would be weak and this would cause him to sleep sometimes. He was never violent when he was under an attack. He said that the accused would use traditional medicine called chifumuro for his ailment. He said that the accused was not on drugs or alcohol.

Isheanesu further said that the accused was not in good books with deceased one (accused's aunt). The accused would occasionally assault deceased one. The accused would also assault the witness for no good reason. The accused was just an angry person who would bully everyone at home and everyone was afraid of him. The witness said that during the first three years of staying at this homestead, the accused was a good person, but he then changed. He became violent, moody and cheeky. The accused had started using a stick that he would sharpen using a glass. He would move around the yard holding the stick not talking to anyone. Whenever the accused would have a misunderstanding with his young brother and the witness, the accused would then assault them using that stick. The deceased persons would try to control and admonish the accused but they would fail. He said that the accused went to school up to Form 4. The witness said that there was no link between the epilepsy the accused was suffering from and the violence he would exhibit when he was not under an epileptic attack. He said that when the accused was under an epileptic attack he would not be violent. He said that when deceased one would give them tasks to do, the accused would come and disturb them. When they asked him why he was doing that, he would then assault them.

The witness said that the accused was not in good books with the rest of the community except for one Wisdom Mavi. When the accused was playing football, he would treat other players badly. He could simply step on another person. If the person asked the accused why he was stepping on him, the accused would ask the person what he wanted to do about it. At home when the accused would assault deceased one, he would either use clenched fists or sticks. He would only leave her when she had fallen down. When great grandmother (deceased two) tried to intervene, the accused would also assault her as well. The accused was the oldest male person at home. Deceased one was widowed whilst deceased two was divorced. The witness said that initially he was sleeping in the same hut with the accused, but when the accused developed the habit of assaulting him during the night, deceased one had to go and ask for a place for the witness to sleep at night at the Shakures, their neighbours.

The witness' evidence about the events of the fateful night was as follows. He went to fetch water with a neighbour. When they returned, deceased one took a tyre which was by the wall of the accused's bedroom hut so that they could use it in offloading the water containers from the cart. The accused who was sleeping inside his hut heard that the tyre had been taken. He came out and said that there was his medicine in the tyre. The first deceased denied seeing any medicine. The accused insisted that it was there. He went inside his hut, took an axe and started chasing her as he threatened to axe her. The deceased went to the police base to make

a report. She went in the company of the other children. The witness said that he also followed them. Upon their return from the police, the first deceased proceeded to unlock her door. The accused emerged from behind the kraal. He went to collect the axe that he had placed behind the tree within the yard. He proceeded to strike the first deceased with it as she was unlocking the door. The first deceased fell down. The accused then started chasing after the witness. When he failed to apprehend the witness, he returned home. The witness said that he did not witness what the accused did when he (the accused) returned home as he (the witness) spent the night at the neighbours. He only saw the accused the following day after he had been arrested, but did not speak to him.

Shadreck Mavhura was the investigating officer. His evidence was as follows. He visited the scene of crime and interviewed the witnesses. He recorded the accused's warned and cautioned statement in respect of the first count the day after the offences were committed. The accused had recounted to the witness how he had been upset with the first deceased over his traditional medicine. The accused had explained how he had struck the deceased. The witness had also recorded a warned and cautioned statement from the accused in respect of the death of the second deceased. The witness said that the accused even made indications to him at the scene of crime of how he had struck the two deceased persons. The witness said that during the course of his investigations no one ever told him that the accused suffered from a mental illness. The witness said that the accused person never told him that he had no recollection of how he had struck the two deceased persons. He said that upon his first sight of the accused he saw nothing that pointed towards mental illness. He said that even the indications that the accused made at the scene of crime matched the indications that were made by the State witnesses. Even the reason that the accused gave for killing the first deceased was the same reason that was given by the State witnesses. The witness said that the accused did not even mention to him that he suffered from epilepsy.

The defence's evidence

Basically, the accused tendered a defence of temporary mental insanity. He stated that he did not remember striking the two deceased persons as he had suffered a blackout at the time and lost control of his mental faculties. He said that he had always suffered from bouts of mental instability since his childhood. In his defence he explained how he had found out that he suffered from a mental ailment whilst in primary school. He told the court that he sought help from faith healers. He said that he never received any medical treatment from the hospital and

that as such the family never got to know what was really wrong with him. He also stated that he was not helped by anyone at home, but he said that his grandfather (deceased two's former husband) at one point took him to a traditional healer after he had visited him. This traditional healer is the one who made him use the traditional medicine called chifumuro. The accused told the court of how he would not remember what he would have done whilst under an attack and would have to be told by someone else. He told the court that he had become afraid that one day he would meet his death whilst under this attack and that is why he tried to find treatment for the illness. He said he found chifumuro helpful.

In his testimony the accused told the court what he remembered of the fateful day. He said that he remembered the following. He had had an argument with deceased two over which field to till but that argument had been resolved. He told the court of how he had been resting in his bedroom hut in the evening when he heard the tyre in which he had put his chifumuro being removed. He went outside to see. He said that he told deceased one to look for his chifumuro in the tyre, but she said that there was nothing in the tyre. He said that when he tried to get to the tyre, but deceased one kept on moving it. He said that he then pushed deceased one and went on to check in the tyre for his medicine, but he did not find it. He said that he then threatened to assault deceased one and she told him that she was going to report him to the police. He said that he told her to go and report him. The accused confirmed that the axe was usually kept in the house and that on this day he had used it during the day and returned it inside. He however disputed using the axe to threaten deceased one in the evening. The accused went on to state that after the deceased persons and the children left for the police base to report him, he took his phone and earphones and sat near the kraal. When he saw the deceased persons coming back home, he went to deceased two and held her hand and started conversing with her as he was asking her what had transpired at the police base. The accused said thereafter he had no recollection of what had happened. He said that he only came to upon hearing the cries of deceased two. He said that he saw the two deceased persons lying on the ground and the axe was also on the ground. The accused said that he wanted to kill himself when he realized what he had done. He went to the neighbours looking for rat poison, but did not find any. So, he ended up taking some herbicide that he had in his bedroom hut. However, it was of no effect as he went on to vomit it. He said that he had tried to go to a neighbour's place to look for a motor vehicle to ferry deceased two to hospital since she was still alive, but as he was on his way, it was then that he started vomiting the poison that he had taken. He abandoned his mission and went into the mountain as he was feeling very weak. That is where

he spent the night and was arrested in the morning by the police and the villagers. The accused recounted how he had been arrested and how he had not spoken to anyone after that. Upon being cross examined on how he had then known what he had done to be able to recount it in his warned and cautioned statements, the accused said that he had deduced this from the scene of crime when he came to his senses.

The accused admitted to not having been in good books with deceased one and how he had assaulted her over the years. He said that this had been due to the fact that deceased one used to say hurtful things to him and would refer to him as a child of a prostitute. He told the court of how he had also assaulted deceased two for trying to restrain him from assaulting deceased one. The demeanour of the accused as he recounted his version of events showed that he was not remorseful. He did not appear regretful for having terrorized an old woman. Rather he blamed her for making him assault her. It is important to note that accused was aware of the number of times he had assaulted the deceased persons and the reasons why he had done so. He never sought to allege that his violent behavior was due to the mental condition that he had. The accused however went on to add that he had been informed by some traditional healers that his violent behavior was due to the fact that someone was using witchcraft on him. He said that he had been told that this person was deceased two (his grandmother) who was said to be using him as a husband. The accused thus introduced new aspects to his defence that were never put to the State witnesses during the State case.

Analysis of evidence

The accused does not dispute the factual allegations leading to the death of the deceased persons as given by the State witnesses. His defence is simply that he suffered a blackout as a result of epilepsy which he was suffering from which affected his mental capacity. In the circumstances of the present case, the accused said that he had suffered from temporary insanity when he struck the two deceased persons.

Section 227 of the Criminal Law (Codification and Reform) Act provides that mental disorder at the time of commission of crime is a complete defence to a charge. It provides that:

227 “Mental disorder at time of commission of crime

(1) The fact that a person charged with a crime was suffering from a mental disorder or defect when the person did or omitted to do anything which is an essential element of the crime charged shall be a complete defence to the charge if the mental disorder or defect made him or her-:

(a) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or

- (b) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful, or both, of acting in accordance with such an appreciation.
- (2) For the purposes of subsection (1), the cause and duration of the mental disorder or defect shall be immaterial.
- (3) Subsection (1) shall not apply to a mental disorder or defect which is neither permanent nor long lasting, suffered by a person as a result of voluntary intoxication as defined in section *two hundred and nineteen*.”

The onus of proving the defence of insanity lies on the accused and the standard of proof is on a balance of probabilities. This is in terms of the proviso to s 18(4) of the Criminal Law (Codification and Reform) Act. The proviso has already been quoted at page 2 of this judgment.

It is common cause that the accused did not place any medical evidence to show that at the time that he committed the offences he was mentally disordered. Neither did the accused produce any medical evidence of previous mental treatment. Although he spoke about suffering from what he and some State witnesses called epilepsy since he was young, still the accused did not adduce medical expert evidence to show that his behaviour on 13 October 2020, was as a result of the so called epilepsy that he had always suffered from. Such evidence would have assisted the accused’s case. This is more so in view of the fact that Isheanesu Madhuba and Wisdom Mavi said that the violence that the accused exhibited on the fateful night was not consistent with the behaviour the accused would exhibit when he was under an epileptic attack. We should hasten to point out that although the State witnesses and the accused said that the accused suffers from epilepsy, there was no expert evidence as to what exactly the accused’s condition is. From the little that the court knows about epilepsy, it does not look like the accused’s condition is epilepsy. With epilepsy, the patient mainly suffers from seizures, yet with the accused, does not suffer from any seizures when he is under attack. If anything, when he is under an attack he walks around as if he is seeing something. At the same time he will be making some humming sounds. He even did this during the course of this trial and the court had to adjourn hurriedly out of fear of this strange behaviour. Whether the accused was genuinely under attack or he stage managed the whole act, only him and God knows. When the court resumed after a short while, the accused fell into another attack as the court was asking him questions. This time around the court decided not to adjourn, but kept on asking him questions. Before long, the accused was back to his normal self. The court noticed that when the accused was under attack in court, he was behaving as if he was seeing something. He kept on saying, “icho, icho” as he was pointing in the air. He was also looking down and smiling as if he was seeing something. The accused never fell down or suffered from any seizures.

It was said that if the accused gets into an attack when he is working on something he continues to work until he comes back to his senses or until the attack is over. It was further said that sometimes he becomes very weak to the extent of falling asleep. Although the accused said that he sought treatment from traditional healers and faith healers, no evidence was placed before the court to show what disease these healers were treating. An accused is presumed sane until the contrary is proved. See *R v Romeo* [1991] I.S.C.R. 86. *In casu* the accused failed to discharge the onus on him to show a balance of probabilities that he had no appreciation of what he was doing or what was transpiring at the time that he struck the two deceased persons. The evidence led by the State shows that the accused was in appreciation of what he was doing at the time he struck the two deceased persons. This is even evidenced by the accused's ability to recall all that had happened when he had his warned and cautioned statements recorded by the investigating officer. For the first deceased, the accused explained that he had struck her once above the left ear and she fell down. He then struck her again on the forehead and she died instantly. The accused said that he had struck her because she had caused him to fail to pick up his traditional medicine. The accused also remembered that he had struck the second deceased on the head and that the deceased had fallen down. Going by what the State witnesses and what the accused himself said, if the accused had been under the "epileptic" attack, he would not have remembered what he did. The fact that he remembered means that he struck the deceased persons knowingly and when he was in control of his mental faculties.

Besides, what the accused said happened is consistent with what the State witnesses who witnessed him striking the deceased said happened. Even the indications the accused made at the scene were also consistent with the indications that were made by these State witnesses at the scene. This is further corroboration that the accused was alive to what he was doing when he was striking the deceased persons. In any case, if the accused had struck the deceased persons whilst under an 'epileptic' attack then there is no reason why he failed to tell the investigating officer when his warned and cautioned statements were recorded. The two statements were recorded two weeks apart, but on both occasions the accused chose to say nothing about his mental illness as at the time he allegedly committed the offences. The story does not end there. The accused was then taken to court where the same statements were confirmed by a magistrate. The accused told the magistrate that he had made these statements freely and voluntarily without being forced by anyone. The statements were read out to him and he accepted them as the statements that he had made. If the accused had had a black out when he was striking the deceased persons, why did he not bring it to the attention of the court

and why did he allow the court to confirm the statements? From 14 October 2020 when the accused was arrested, he was never released on bail until his trial commenced in March 2022. So, he was in custody for more than a year before his trial commenced. However, all the while the accused was never examined in terms of the Mental Health Act. This means that the accused never revealed to anyone that he had a mental illness. The accused only raised the issue of mental illness to his defence counsel when trial was about to commence. Clearly, this defence of suffering a blackout was an afterthought.

The evidence that the accused gave in his defence case shows that he was just a bully and always on edge with his family members. He confirmed that he had assaulted the first deceased on a number of occasions over the years. His excuse was that she used to insult him as she would refer to him as a child of a prostitute. The accused is now 24 years old which means that in 2020 he was 22 years old. The accused said that the main reason why he was not in good books with the first deceased was because of the household chores. Whenever he failed to do the chores as per her expectations, she would insult him. Whether or not this was true, it is difficult to say because all this was not put to Isheanesu Mudhuba who was staying with them when he testified.

The accused explained that on the morning of the fateful day he had a misunderstanding with deceased two, his grandmother over which field to till. They were not in agreement. This goes on to show that the accused was just but a stubborn young man who had no respect for his elders home. Grandmother was the head of the family and she had her reasons for wanting a certain field tilled, but here was the accused busy arguing with her because he wanted to till a different field. He argued with grandmother until she sought the help of a male neighbour. This confirms what Isheanesu Mudhuba said about the accused being feared by everyone at the homestead. The accused even confirmed that the first deceased was afraid of him.

About the Chifumuro that caused the accused to kill deceased one, the accused said that this is the medicine that he used for treating his ailment. He said he would use it in his drinking water and bathing water. He said that he would keep it on his person all the time as instructed by the traditional healer. The accused said that he had gone to the mountain and dug it up on the morning of the fateful day. He said that he had then put it in the tyre that deceased one later took because it had mud. He said that he had wanted to clean it first before preparing it for use. The accused said that after he suffered a black out, he regained consciousness after about 5 minutes. If it was a blackout, how did the accused know the time that had passed before he came back to his senses? This issue about a blackout was just but a lie. In any case the

accused said when he came to his senses, he saw deceased two lying on the ground crying in pain, but he rendered no assistance to her. He did not even speak to her. He did not even ask her what had happened. He left her in agony as he went to the neighbours looking for poison to kill himself. From the way the accused explained, he did not show that he had been horrified to see and realise that he had killed deceased one and severely injured deceased two when he came to his senses. The accused's reaction was not that of a person who was shocked by what he was seeing. This confirms that when the accused struck the two deceased persons he was aware of what he was doing. He had not suffered any blackout.

The accused said that the traditional medicine was important to him because he had realized that it was working very well for him. The accused admitted that the first deceased had angered him very much because during that time of the year it is difficult to find the medicine and he had already used the last he had. The accused said that he had to make sure that the one he had dug was kept safe. It is therefore clear that when the accused struck the deceased one it was not because of insanity, but extreme anger over the lost Chifumuro. He had used the last he had. He was in good control of his mental faculties. It is just that he was a person who was so used to being violent with no one to restrain him at this home such that he did not see anything wrong with his violent behaviour.

We are thus in agreement with the State counsel that the accused is a man who knew what he had done and why he had done it. He may have a mental ailment of some sort which the family terms epilepsy, but on the fateful day the ailment played no role in the actions of the accused. When the court asked the accused some questions, he admitted that he had anger management issues since childhood. He said that he was unable to explain why he was unable to restrain himself from assaulting the deceased persons whenever he would assault them. The accused said that he was not happy that everyone at home was afraid of him. He then tried to bring in spiritual issues saying that he had been told that his behaviour was spiritual. He said that the faith healers had told him that the second deceased was using him spiritually and that she was the person behind his "epileptic" illness. He further indicated that he had also been told that she was using him as a husband. He however said that he never confronted her over these issues despite knowing about them for 3 years. He said that this was because he had respect for her. Whether all this was true or not, it is difficult to know because this was not put to Isheanesu Mudhuba to comment on. These are issues that the accused raised for the

very first time during the defence case well after the State had closed its case. The court cannot therefore accept them as true.

From the way the accused struck the two deceased persons, it is clear that he intentionally killed them. He struck each one of them twice with a big axe on their heads and collar bone. Evidence shows that for deceased two, the accused was just annoyed by the fact that she continued to scream as she cried out that her daughter had been struck with an axe. This is why the accused struck her. It had always been the accused's behaviour that he never wanted deceased two to restrain him whenever he was assaulting the first deceased. That always infuriated him. This is the same thing that he did on the fateful night. He even chased after the children who had cried out when he struck the first deceased. The children were wise and young enough to run away, but deceased two being old and crying over her daughter, she could not leave. Her daughter died as she watched helplessly and when the accused came for her, she made no attempt to run away. In any case she was too old to run. She was struck as she continued to cry for her daughter. Even after she had been struck, she continued to cry for her daughter. People who arrived at the scene found her praying and crying that her daughter had been struck with an axe.

In view of the foregoing, we find the accused guilty of the two counts of murder as charged.

Sentence

In arriving at the appropriate sentences, we considered that the accused is a first offender. When he committed the offences he was 22 years old. Now he is 24 years old. As a youthful offender he deserves some lenience. Whilst the accused has no history of using drugs and alcohol, the evidence led from the State shows that he was just a violent person at home. He would assault everyone including the two deceased persons as he pleased yet these are the people that were looking after him. He would assault them despite the fact that they were 59 years and 81 years old respectively. He had no respect for them. During trial he even said that they were afraid of him. The accused did not want to be restrained at all. When he testified, he spoke to these things and was not even ashamed or remorseful for his behaviour. Even in the community that he lived he was feared. He was known for his violence. The end result is that the accused committed two murders over a very small issue of his chifumuro which went missing. He murdered the very people that were looking after him. His grandmother, deceased two had taken him at the age of 9 months after his parents had divorced. He struck the two

deceased persons with an axe. The first deceased was struck on the head twice. The second deceased was struck on the collarbone and on the head with the same axe. There is no doubt that the accused killed the two deceased persons in cold blood. Whilst it was shown that the accused suffered from some form of illness that people commonly referred to as epilepsy, it was clear that the illness in question played no role in the behaviour of the accused on the day he struck the deceased persons with an axe.

The murders that the accused committed were committed in aggravating circumstances. He murdered two people, his paternal aunt and his paternal grandmother at the same place one after the other during the same episode. See s 47(2)(b) of the Criminal Law Code. Moreover, these were the most important people in his life. The second deceased was 81 years old and she had raised him. She was over the age of 70 years which is another aggravating circumstance. See s 47(3)(b) of the Criminal Law Code. Her crime was to cry over her daughter, the first deceased who had been murdered in her presence before her very eyes. A further aggravating circumstance is that the murders were premeditated. See s 47(3)(a) of the Criminal Law Code. When the deceased persons went to report the accused to the police base for his violent conduct that evening, he remained at home alone. He took the axe that was normally kept in his bedroom hut and placed it under a tree which was in the yard. As soon as the deceased persons returned home, the accused went to fetch the axe and from where he had placed it and attacked the first deceased who was opening the door to her bedroom. The first deceased was murdered in full view of her mother, the second deceased, her juvenile daughter and juvenile grandson before their very eyes. The daughter and the grandson are going to live with the trauma of the horrific murder for the rest of their lives. When the second deceased cried out on seeing her daughter being murdered, she was also struck with the same axe.

This is a case where the death sentences are called for. However, in view of the accused's young age of 22 years when he committed the offences and that he had come to believe that he could not function without chifumuro, we are inclined to spare him the death sentence and sentence him to imprisonment for life instead as was proposed by the State. The effect of the sentence of imprisonment for life in this jurisdiction is that the sentenced person (the accused) shall remain imprisoned for the rest of his life: see s 344A of the CPEA. We reject the proposal of a sentence of 20 years' imprisonment made by the defence counsel. This is because the way the accused committed the murders show that he is a bully and a danger to society. The people at home were afraid of him and the people in the community he lived also feared him. He had no regard for his family members at home at all. Throughout the trial he

did not show any remorse for killing his care givers. If he could not show mercy to an 81-year-old woman who happened to be his own grandmother who cared for him since he was 9 months old, there is no way he can show mercy to anyone else. He poses a significant risk to society and society is better off without him because at the slightest provocation he becomes very violent. The accused can cause unnecessary loss of human life. The accused is thus sentenced as follows.

Count 1- Imprisonment for life.

Count 2 -Imprisonment for life.

*The National Prosecuting Authority, the State's legal practitioners
Caleb Muccheche and Partners, the accused's legal practitioners*