

THE STATE
versus
NOMORE MAKWINJA
and
DIANA MAKWINJA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 &14 March; 24 May; 5, 7 & 30 June & 3 July 2023

Criminal trial

Assessors: Mr Mpofu
Mr Kunaka

Ms C Mutimusakwa, for the State
T Shadreck, for the accused

MUREMBA J: The accused persons who are brother and sister respectively are accused of having murdered one Diana Makwinja Junior who was a biological daughter of the first accused and a niece to the second accused Diana Makwinja. Both accused persons pleaded not guilty to the charge of murder. However, the first accused pleaded guilty to the lesser charge of assault which plea was not accepted by the State.

The allegations are that the two accused persons assaulted the deceased during the period extending from 8 July 2022 to 10 July 2022 at House number 6750 Budiriro 4, Harare where the deceased was staying with accused two, Diana Makwinja (senior). The two are alleged to have assaulted the deceased using open hands, fists, iron bars and a cooking stick several times on the buttocks and all over her body realising that there was a real risk or possibility that death may occur and continued in such conduct despite the risk or possibility.

In denying the charge accused two stated that from 8 July to 10 July 2022 she was not at home but in Kadoma where she had gone to attend a work meeting. The second accused is employed by City of Harare as a nurse aid. She said that she only returned home on 10 July 2022 at 1700 hours. She said tht she even found the deceased cooking in the kitchen. She said that she was appraised by accused one that he had disciplined the deceased after she had failed

an English past examination paper. Accused two said that when the assault was perpetrated on the deceased, she was not present.

The first accused who ordinarily resides at his rural home in Hwedza said that he arrived at the second accused's house in Budiro on 8 July 2022. He never assaulted the deceased on this day. On 9 July 2022, he gave the deceased an English past examination paper to write. He then marked it and the deceased who was about to sit for her 'O' Level examinations failed the paper. He said that this did not sit well with him because he had received several complaints from the second accused about the deceased being mischievous by arriving home late from school, having boyfriends, taking drugs, being rude and arriving late at school among other things. The first accused said that he took a broom stick and made her to lie down on her stomach in the kitchen whereupon he then assaulted her on the buttocks not with the intention to kill her but to instil discipline. No one witnessed the assault because the door, the windows and the curtains were closed. He assaulted her for almost 10 minutes with breaks in between as he would talk to her asking her why she was being mischievous and why she had failed the English paper. The deceased did not even cry or shout for help. The first accused said that this was the only incident when he assaulted the deceased. He denied assaulting her on the next day the 10th of July 2022.

The first accused said that he chose to assault the deceased on the buttocks as they are not vital organs of the body from which death is likely to occur as compared to other parts such as the head, chest or the stomach. The first accused said that he had no intention to kill his child nor did he realise that there was a real risk or possibility that by his conduct he may cause death to the deceased. The first accused also said by assaulting the deceased on the buttocks it cannot be said that he negligently failed to realise that death may result from his conduct and that he negligently failed to guard against his conduct. The first accused further stated that from the 9th of July 2022 when he assaulted the deceased, she died after 21 days, on the 30th of July 2022 at Sally Mugabe Central Hospital where she had been admitted for treatment since the 15th of July 2022. He said that on 18 July 2022, the deceased was operated on the buttocks as reflected on the post mortem report. He said that both himself and the second accused bought all the medicine that was prescribed by the doctors to treat the infection on the buttocks. The first accused said that if all the medicine that they bought had been properly administered, the deceased would not have died. He would have responded to the medicine and the infection would have stopped. The first accused stated that the post mortem report shows that the cause

of death was general sepsis which is different from the assault that he perpetrated on the deceased.

The State's evidence

To prove its case, the State produced the post-mortem report through Dr Tsungai Victor Javangwe who explained it in place of Dr Matinez who compiled it. Dr Matinez was not available to explain it. The remains of the deceased who was aged 16 years were examined on 5 August 2022. The causes of death were concluded to be general sepsis, pyomyositis abscess in both gluteal; and severe gluteal trauma secondary to assault. On the comment section Dr Matinez stated that the deceased was assaulted and suffered trauma in both gluteal. Secondary to this, the deceased presented a pyomyositis abscess and infection in this region resulting in general infection of the body. Dr Javangwe explained that gluteal means buttocks. He said that the deceased had developed an abscess in the buttocks as a result of the assault that was perpetrated on her. An abscess is a confined pocket of pus that collects in tissues, organs or spaces inside the body. When an area in the body becomes infected, the body's immune system sends white blood cells to fight the infection. These cells collect and combine with the damaged tissue and germs creating liquid called pus. The abscess resulted in an infection which resulted in general sepsis. The doctor further explained that if you experience blunt force trauma (being hit or struck with an object that is not sharp) to your tissues or skin surface, even though there might not be an obvious sign of the breaking of the skin, you can damage the muscles underneath. Therefore there might be bleeding underneath the skin surface. With this, there can be a risk of tissue becoming septic or infected and a person can end up with complications of septic shock. He explained that *in casu* the deceased's buttocks had developed some pus because of the infection. This is what resulted in her being operated on in order to remove or take out septic material in a bid to save her life. The buttocks were now tender. He said that because of the operation, the deceased now had a large open wound in her buttocks area and because it is a dirty area because of its proximity to faecal matter and urine, the deceased remained at the risk of continued infection. General sepsis occurs when the body's response to an infection is overwhelming, potentially leading to organ failure and septic shock. In *casu* the post-mortem report shows that the deceased's liver had signs of infection, the kidneys had signs of shock, the lungs and the heart were pale.

The pictures of the deceased that were taken during the post-mortem examination were produced. Dr Javangwe commented on them and said that moderate to severe force could have

caused the complications the deceased suffered. He said a severe assault which could have been once off or repeated could have caused the complications. He was not able to tell if the assault was a once off incident or if it was repeatedly perpetrated.

The defence had no questions for the doctor. Mr *Shadreck* submitted that the doctor had clarified all issues.

To prove that the accused persons assaulted the deceased the State led *viva voce* evidence from Naume Madziro, Nyembesi Mtetwa, Sheperd Chinyai and Joseph Mafunda Chipunza. From their evidence it is not disputed that the second accused was not at home from the 8th to the 10th of July 2022 in the afternoon. It is not disputed that she had gone to Kadoma to attend a work meeting. What is disputed is the time that she arrived home from Kadoma on the 10th. Therefore, the second accused did not participate in any assault that could have been perpetrated on the deceased by the first accused before her return from Kadoma.

In as for as the 8th of July 2022 is concerned, the State witnesses managed to give evidence which shows tht the first accused did assault the deceased. It is not disputed that this is the day that the first accused arrived from his rural home. Naume Madziro (24 years) who was a tenant of the second accused at 6750, Budiro 4, Harare testified to the effect that she had been a tenant at this house for 2 years before the incident. She knew both accused persons and the deceased very well. She even said that she was friends with the deceased. She was renting 2 rooms inside the second accused's house. However, at the time she testified in this trial she was no longer a tenant there. She said that she had moved out in March this year (2023).

Naume Madziro said that on 8 July 2022 the first accused arrived from his rural home in the afternoon around 3pm. He put his bag on the sofa and went out. After a while the deceased arrived from school. When she saw her father's bag on the sofa and learnt that he had come she remarked that trouble had begun. A short while later, the first accused got into the house. He started asking her how she had come home from school on that day. Without giving her a chance to explain he was already threatening to assault her. They were in the passage. He threatened to pick up a stool, but eventually did not. He started scolding her. He removed his shirt and remained with a vest. He armed himself with a broomstick which he then used to assault her all over her body indiscriminately for about 2 hours up to around 5-6 pm. He assaulted her until the broomstick broke into pieces. He asked her when last she had gone for extra lessons. Before she could respond he asked her to go with him to see the extra lessons teacher. Naume said that the accused was very angry and he was using severe force to assault

the deceased. When the broom stick broke he started using his bare hands as he was making utterances that the deceased wanted to be as stubborn as her mother. Apparently the deceased's mother and the first accused were divorced. The deceased's mother is staying in South Africa. The accused stays at his rural home with his new wife. That explains why the deceased was staying with the aunt the second accused.

Although the first accused person tried to dispute that he assaulted the deceased on 8 July 2022, Naume Madziro's evidence was corroborated by Nyembesi Mtetwa, a neighbour of the second accused. Her evidence was to the following effect. She resides at house number 6753 and has been neighbours with the second accused for more than 29 years. As neighbours they had a cordial relationship. She had known the deceased for 3 years. Accused one would come to visit at accused two's place frequently. On 8 July 2022 at around 9 pm, the deceased came to her place in the company of another neighbour one Mrs Mhofu. She said she was looking for a place to sleep because she had been assaulted by her father. She was crying. She was swollen on the arm and on the forehead. She had initially gone to Mrs Mhofu's place, but Mrs Mhofu had said that she had no place to accommodate her. The deceased then asked Mrs Mhofu to accompany her to Nyembesi Mtetwa's place. Nyembesi said that she gave her a place to sleep. At around 11 pm she thought of going to the second accused's house to inform the first accused that the deceased was at her place lest he was looking for her. On her way there, she decided to get male company. So, she decided to go and ask Mr Chipunza who is another neighbour to accompany her. When she entered the house, she found the first accused in there looking for the deceased. She then informed him and Mr Chipunza that the deceased had sought refuge at her place. She then went back to her house. She said that she did not ask the first accused about the assault. On the next morning at around 9 am, the first accused came and collected the deceased who was still in Nyembesi's spare bedroom.

Nyembesi Mtetwa's evidence is pertinent in that she was told by the deceased herself that she had been assaulted by her father and this is the reason why she had come looking for a place to sleep. As confirmation of the assault, Nyembesi saw that the deceased was swollen on the arm and on the forehead.

Sheperd Chinyai who is the extra lessons teacher and a pastor testified that he also resides in Budiro. He started assisting the deceased with extra lessons since she was in form 2 right up to Form 4. On Friday 8 July 2022, the first accused phoned him around 5 pm asking when last the deceased had attended extra lessons. When he told the first accused that the deceased had not come for lessons, the first accused brought the deceased to his house shortly

thereafter. The first accused was very furious. He was saying that he had received reports that the deceased was being promiscuous and doing drugs. He was holding the deceased's phone and saying that she was having a love affair with a certain young man and that despite having reprimanded her in the past, she was still continuing with the affair. Mr Chinyai said that since it was now dark, he asked the first accused to go home with the deceased and bring her on the next morning so that he could talk to her. The first accused and the deceased went away. They returned the next morning around 10 am. Mr Chinyai said that he observed that the deceased was swollen on the arm and she had difficulties walking. He said he did not ask the deceased about the swollen arm or her difficulties in walking. The witness said that he then spent the better part of that day (the 9th of July) with the first accused and the deceased as he tried to assist them to resolve their issues.

What is pertinent about Mr Chinyai's evidence is that it confirms that the deceased was assaulted on 8 July 2022 even if he did not witness the assault happening and even if no one told him about it. He observed on the morning of 9 July 2022 that the deceased had a swollen arm and had difficulties walking. This corroborates the evidence of Nyembesi Mtetwa who had also observed that deceased had a swollen arm on the evening of 8 July 2022 when she came to her place looking for a place to sleep.

Joseph Mafunda Chipunza another neighbour of the second accused confirmed that on the evening of 8 July 2022, the first accused came to his place at around 10 pm. He said he was looking for the deceased. When he asked him why, the first accused explained that he had received a report to the effect that the deceased was being promiscuous and taking drugs. As they were talking Mrs Mtetwa knocked on the door. She had come to ask the witness to accompany her to the accused's house in order to report that their child, the deceased had sought refuge at her place. Mrs Mtetwa said that the deceased had reported that she had been assaulted by her father. The first accused confirmed that he had assaulted the deceased by saying that he had disciplined her because she had become naughty.

Although Mr Chipunza did not witness the first accused assaulting the deceased on 8 July 2022, his evidence served to confirm the evidence of Nyembesi Mtetwa that the deceased went to Nyembesi Mtetwa's place to seek refuge for the night after she had been assaulted by her father. The evidence also shows that the first accused confirmed having assaulted the deceased when he said he had disciplined her because she had become naughty. Mr Chipunza just like the rest of the witnesses impressed the court as a credible witness. We have no reason whatsoever to believe that any of them lied against the first accused. These are people who all

used to enjoy cordial relationships with the first accused. They all knew him well as he was a frequent visitor at the second accused's house. Besides, their different narrations of the assault of the 8th of July 2022 were not based on what they had witnessed together at the same place and time. They witnessed what they narrated at different times and places yet their narrations merged and corroborated each other. They can be summed up as follows. On 8 July 2022, between 3pm and 5pm Naume Madziro witnessed the first accused severely assaulting the deceased at the second accused's house. On that same day in the evening around 9pm Nyembesi Mtetwa saw the deceased who came to her place asking for a place to sleep saying that she had been assaulted by her father. She was swollen on the forehead and on the arm. That same evening around 10 -11pm Nyembesi Mtetwa found the first accused looking for the deceased at Joseph Mafunda Chipunza's place. The first accused confirmed to Joseph Chipunza that he had assaulted the deceased. On the next day, the 9th of July 2022, the extra lessons teacher observed that the deceased was swollen on the arm and had difficulties walking. All these people could not have lied against the first accused. Their narrations were inextricably and logically connected. We thus make a finding that the first accused indeed severely assaulted the deceased on the 8th of July 2022 as was narrated by Naume Madziro.

The accused said that on 9 July 2022, he assaulted the deceased after she had failed an English past examination paper. However, Naume Madziro the tenant did not speak of any assault that happened on that day. She said that in the morning the deceased woke up to do her morning chores and even showed Naume her back which was swollen. She was also swollen on the arms and legs. This was due to the assault of the 8th of July. Naume said that she then remarked that if it was not for the fact that she is a Seventh Day Adventist she would have assisted the deceased in doing her chores. Naume said that on this day the first accused stopped scolding the deceased and even ate the food that she cooked. Naume said that the day passed without incident. She said that she could not comment on the English past examination paper that the deceased is said to have failed on that day because she was not aware of that issue. Nyembesi Mtetwa said that after the first accused had collected the deceased from her house on 9 July 2022 around 9 am, she never witnessed any other incident because she then travelled. Joseph Chipunza said that on the 9th of July 2022 around 10 am as he was at his house, he saw the first accused collecting the deceased from Nyembesi Mtetwa's house. He said that that was all he saw on that day. Sheperd Chinyai the extra lessons teacher said that he spent the better part of the day with the first accused and the deceased. The two came to his place at around 10 am. That is when he noticed that the deceased had a swollen forehead and had difficulties

walking. This was proof of the 8th of July assault. Mr Chinyai said that he then went with the deceased to see the deceased's boyfriend. The boyfriend lived close by. On the way they passed through the second accused's place of residence where the first accused remained whilst Mr Chinyai and the deceased proceeded to see the boyfriend. They found the boyfriend at home. Both admitted that they were in a love relationship. Mr Chinyai said that he provided counselling services to them and urged them to concentrate on their studies. From there Mr Chinyai and the deceased went back to the second accused's house where Mr Chinyai said he reported to the first accused that he had spoken with the children. The first accused who was still furious continued yelling at the deceased. He was making reference to things that he had discovered in the deceased's phone. Mr Chinyai said that the first accused ordered the deceased to go and touch an iron bar that was in the garden, which she did. They were seated at the verandah. When the deceased touched it, the first accused asked her if she had felt its texture and she confirmed. The first accused then remarked that if she was going to repeat what she had done, he was going to assault her with that iron bar. Mr Chinyai said that the iron bar looked like a metal pipe that is hollow inside. Mr Chinyai said that the first accused continued yelling until he (Mr Chinyai) decided to ask to speak to the deceased aside. He said he took her away and continued talking to her. The deceased was looking very stressed. She did admit being in a love relationship but she denied being promiscuous and taking drugs. Mr Chinyai said he told her to apologise to her father. When they returned to the second accused's house around 3pm, the deceased kneeled before her father and said, "Father I ask for forgiveness." He asked her why she was asking for forgiveness and she said that it was about being promiscuous and taking drugs. Mr Chinyai said that the deceased had decided to apologise for everything she was being accused of so that the first accused could cool down. Mr Chinyai said that he then left for his place after 3pm. He did not witness the accused assaulting the deceased on this day

So as far as the State witnesses are concerned none of them witnessed the assault of 9 July 2022 which the first accused said he perpetrated on the deceased. However, two of the State witnesses: Naume Madziro and Joseph Mafunda Chipunza testified to having witnessed the assault of the 10th of July 2022 yet the accused persons denied that the deceased was assaulted on that day.

It was Naume Madziro's evidence that on the morning of 10 July 2022, the deceased woke up to do her usual cleaning chores but it was clear that she was in pain and her body was swollen. When she was done cleaning, she took her books and started studying in the kitchen.

The witness who was outside said that she then heard the first accused shouting at her. She then heard him assaulting the deceased. He had picked up an iron bar which was about 6cm in diameter and 1metre long from outside the house. At around 2pm the second accused arrived from Kadoma in the company of a workmate. She got into the kitchen where the first accused was assaulting the deceased. The witness who said was in the passage then heard the first accused explaining to the second accused what had happened. Accused two started scolding the deceased. Naume said that she then heard the sound of a drawer being opened. She said she then went outside the house. Accused two came out of the house and went to the back of house where she picked up an iron bar which was thinner than the one the first accused had picked up. Naume said that she pleaded with the second accused not to further assault the deceased saying that she had already been assaulted for a very long time. The second accused is said to have replied saying that the deceased was very stubborn. Accused two went back into the house and started assaulting the deceased as well. Naume said that she could hear the deceased crying out saying, “Daddy, tete muri kundikuvadza” meaning, “Daddy, aunt, you are injuring me.”

Naume said that since she was outside, she could not see what the second accused was using to assault the deceased. All she could hear were the sounds that showed that the deceased was being assaulted. When it was put to her during cross examination that the second accused had only arrived home from Kadoma around 4pm she denied and said that she had arrived at 2pm. Naume said that Joseph Chipunza had also come to their place on this day. She said that the second accused arrived first before Joseph Chipunza arrived. Naume said that on the day, the deceased was assaulted from morning to evening when her boyfriend was later called to discuss the issue that he was having a love affair with the deceased and that they were doing drugs together.

Naume said that on 11 July 2022, the second accused asked her to sweep in the kitchen. She said she saw broken pieces of cooking sticks. She said that she did not see the iron bars. Naume said that she used to spend a lot of time with the deceased whiling up time. To her, the deceased was not a problem child. The problem was that the first accused would receive false reports from the second accused that the deceased was being promiscuous and taking drugs. Naume said that the second accused had a problem of talking too much.

Joseph Chipunza testified as follows. On 10 July 2022, he woke up from an afternoon nap around 4 pm. He decided to go to the second accused’s house to check on what had happened with the deceased since the night the first accused told him that the deceased had become naughty. When he entered the second accused’s yard, he heard some sounds as if

someone was being assaulted. He asked Naume Madziro also known as Mai Tanya, a tenant at the house whom she found outside as to what was happening. She said that the deceased was being assaulted. The sound was coming from the kitchen. He said he proceeded there. He opened the door without knocking. He saw the deceased lying on the floor on her stomach. Her pair of trousers was lowered to knee level. She was wearing pair of skin tights. The first accused was assaulting her with an iron bar on the buttocks. He struck her twice in his presence. The second accused was seated on the chair and on the table there were broken pieces of a cooking stick and a whisker. The second accused was talking about the deceased's naughtiness saying that the deceased was now bringing her boyfriends into the house and even preparing meals for them. Mr Chipunza said that it was like a dream for him seeing the first accused assaulting the child with an iron bar. He said that after the accused had struck the deceased for the second time in his presence, he asked him to stop. The first accused was so furious that he could not be restrained. Mr Chipunza said that he then suggested to him that it was better for him to use a switch instead of an iron bar to assault the child. The first accused said that an iron bar would make her understand better. He however went on to ask Mr Chipunza if he had a fan belt from a motor vehicle. Mr Chipunza said that he confirmed that had something like it. He then left for his house to go and collect it. On his way back he met the deceased's older brother, one Diamond who was following him. Diamond said that the first accused was still assaulting the deceased. The two went back to the second accused's house together. When they arrived, Mr Chipunza handed over the belt to the first accused who was still assaulting the deceased. However, he was now a bit understanding. He put the iron bar aside. Mr Chipunza said that after handing over the fan belt he did not take long before he left for his house. He said that it was now towards 6pm.

During cross examination Mr Chipunza said that he never saw the second accused assaulting the deceased on that day. The witness disputed that the second accused had arrived from Kadoma at around 5 pm. He was adamant that when he woke up from his nap at 4pm he immediately proceeded to the second accused's place and found her having arrived from Kadoma. Mr Chipunzas said that there is one house in between his house and the second accused's house and the distance between them is 20 -30m. He said that they are in a close and Nyembesi Mtetwa's house is about 40metres away from his. Mr Chipunza said that the first accused only stopped assaulting the deceased when he entered the kitchen with Diamond. He said that the iron bar that the accused was using was about 1 metre long and its diameter was like the diameter of the standard metal kitchen chairs.

Mr Chipunza said that when the deceased was being assaulted, she was pleading with the first accused to forgive her saying that it was enough but the first accused was just too emotional. Mr Chipunza said that he did not witness any attempt by the second accused to restrain the first accused. He said that there was a time lapse of about 40 minutes from the time that he went to his house to look for a fan belt and the time that he returned to the second accused's house.

It is clear from the evidence of Mr Chipunza that the first accused did assault the deceased again on 10 July 2022. His evidence corroborates that of Naume Madziro in all material respects. Although she did not witness the deceased being assaulted, she heard from the sounds and the cries that the deceased was being assaulted. The two witnesses spoke of a prolonged assault on the deceased which Naume said had started in the morning. Mr Chipunza said that he arrived at the second accused's house around 4pm and found the deceased being assaulted. The assault stopped towards 6pm when Mr Chipunza brought the fan belt. It was not made clear whether or not the assault resumed after Mr Chipunza had left for his house. We are convinced that the two State witnesses could not have been lying about the assault that happened on this day. They had no reason to lie.

What is obvious from the evidence that the State witnesses gave with regards to the assaults that the first accused perpetrated on the deceased on 8 July and 10 July is that the assaults were prolonged and severe. The 10th of July 2022 was even worse because the first accused resorted to using an iron bar. He had even made the deceased to lower her pair of trousers to knee level. What remained covering her buttocks was a skin tight. It was just as good as she was wearing nothing. The skin tight could not have protected her buttocks from the brutal and severe force of the iron bar. We do not believe the first accused's defence that he only assaulted the deceased for about 10 minutes on Saturday the 9th of July 2022 after she had failed an English past examination paper that he had given her to write between 10am and 12 noon. None of the State witnesses confirmed this story of the deceased being given an examination paper to write on Saturday 9 July 2022 and being assaulted for failing it. Naume Madziro said the 9th of July 2022 passed without incident. We believe her because Mr Chinyai the extra lessons teacher said that he spent the better part of the day with the first accused and the deceased. That is the day the first accused and the deceased arrived at Mr Chinyai's house at around 10 am and Mr Chinyai and the deceased then went to see the deceased's boyfriend. Mr Chinyai then left the second accused's house after 3 pm. If it is true that the first accused did indeed give the deceased an examination to write, this must have happened on Sunday 10

July 2022 in the morning and in the kitchen. This corresponds with what Naume said about the deceased taking her books and studying in the kitchen after she had done her household chores. Naume said that as she was outside, she then heard the accused shouting at the deceased who was studying in the kitchen. In fact, it appears that this is what might have triggered the first accused's anger on this Sunday morning. The deceased must have failed the examination that the first accused was talking about.

That the deceased was severely assaulted on the buttocks goes without saying. It has been amply demonstrated by the analysis of evidence done above. The post mortem report also shows that the assault that was perpetrated on deceased's buttocks is what resulted in the complications and internal injuries that then caused her death. The first accused sought to argue that the deceased was not properly treated for the injuries that she had sustained and in his view this is what resulted in the death of the deceased. That averment is not supported by any medical evidence. It was just the first accused's word and opinion. He needed to adduce expert evidence on this issue if he wanted to be believed. We thus make a finding that the primary cause of the deceased's death was the assault and the secondary causes were the medical complications that then arose from the assault as explained in the post mortem report. On this basis we find that the first accused is liable for the death of his daughter for he severely assaulted her.

The question now is: is the first accused guilty of murder as alleged by the State or is he is guilty of assault as he pleaded. Murder is an offence which is committed with intention. Intention can either be actual as defined in s 47 (1) (a) or legal as defined in s 47 (1) (b) of the Criminal Law Code. However, the test for both actual and legal intention is a subjective one. See G Feltoe *A Guide to the Criminal Law of Zimbabwe*, 3rd Edition LRF 2004 at p 10. We therefore look at the subjective state of mind of the accused person when he committed the offence. With actual intention, the accused must have desired death to be the outcome of his actions or conduct. In the circumstances of the present case can we say in his mind the first accused desired the death of his daughter? We do not believe that the first accused came all the way from Hwedza with the intention to kill his daughter. If anything, from the way the first accused conducted himself right from the day that he arrived, he showed that he was passionate about the success of his daughter. To sum it up, all he wanted was the best out of his daughter. He came specifically because he had heard from his sister that she was being naughty. It had been reported that the deceased was now promiscuous in that she was bringing boyfriends into the house, she was now taking drugs such as crystal meth and marijuana, she was bunking extra lessons and she was arriving late at school and late at home from school. Evidence led from

the State witnesses showed that indeed the deceased had a boyfriend at the time. Mr Chinyai the extra lessons teacher also confirmed that there were days when the deceased would not turn up for her lessons. Naturally the first accused was concerned as a parent, hence his anger and conduct towards the deceased. He obviously had good intentions for her but it was his approach to the whole issue and manner of disciplining the child which was totally wrong. It does not look like he ever tried to hear the child's side of the story. He was too hard on her and unforgiving. However, that cannot be interpreted to mean that he intended the death of his child when he was assaulting her. We cannot therefore find him guilty of murder in terms of s 47 (1) (a) of the Criminal Law Code.

Alternatively, can it be said that the first accused had the legal intention in terms of s 47 (1) (b) of the Criminal Law Code to murder his daughter? Did he realise that there was a real risk or possibility that his conduct may cause the death of the deceased but nevertheless persisted or continued to engage in that conduct despite the risk or possibility? Ms *Mutimusakwa*, for the State submitted that the first accused must be convicted of murder in terms of s 47 (1) (b) because he perpetrated a persistent, protracted and vicious assault on the deceased using an iron bar and was extremely reckless. She said that this was even worsened by the fact that the accused persons did not take the deceased to hospital. Had it not been for an anonymous call from a member of the community who alerted the police who then brought an ambulance which ferried the deceased to hospital on the 15th of July, the deceased would not have been taken to hospital. We do acknowledge the observations by the State counsel and to a large extent agree with her. However, we are not persuaded that the first accused realised that there was a real risk or possibility that his conduct could cause the death of the deceased. We say this because during trial the first accused did shed some light on what was going on in his mind when he was assaulting his daughter. He said that he did not subjectively foresee that death could occur because he was assaulting the deceased on the buttocks. He further said that a person cannot die as a result of being assaulted on the buttocks. Clearly, he did not realise that death could occur from being assaulted on the buttocks. To him buttocks were the least dangerous body parts that could result in a person dying after being assaulted. He even said that after the assault there were no visible injuries on the deceased except the swellings. He said that he genuinely believed that the swellings were going to resolve with the continued application of hot water compression. As a layman he had no appreciation that the tissue beneath the skin surface could be severely damaged resulting in bleeding and in an infection that would cause general sepsis which would in turn cause failure of vital body organs such as

the liver, lungs, kidneys and the heart. He absolutely had no appreciation of the effects of a protracted and vicious assault on the buttocks. This is why the two accused persons made no effort to take the deceased to hospital. To them, she had no visible injuries and that meant that she was not injured or in any danger. That is why they even expected her to go to school on the next day, the 11th of July 2022. She even woke up and prepared for school. To them, she was in good health. The first accused said that he even took a different to her school and got there after 8 am. He said that he did this in order to ascertain if she was going to get to school, only to be phoned as he was at the school and told that she had failed to make it to school and that she was at Starlight surgery failing to walk. That is when he boarded a combi and went back to attend to her. All these actions show that the first accused never subjectively foresaw death occurring to his child from his conduct. After taking the child home in a wheelbarrow, he was with her until Wednesday the 13th of July 2022 when he left for his rural home. He said that when he left, the deceased was getting better. She was now able to walk and at one time he took a walk with her up to Mr Chipunza's place. Mr Chipunza confirmed this. The first accused said that he believed that the application of the hot water compression was working. Even the second accused who is a nurse aid said she also believed the same. We honestly do not know whether the accused persons were being truthful or not because in our view their conduct of not taking the deceased to hospital might have been out of fear that they could be arrested for assault because obviously the deceased was going to be asked what had happened to her. However, whatever the accused persons' reasons for not taking the deceased to hospital were, we cannot take it to mean that they realised that there was a real risk or possibility that this conduct may cause the death of the deceased and nevertheless continued to engage in that conduct despite the risk or possibility. These are people who believed that buttocks can withstand any form of assault. Under the circumstances we cannot say that the first accused did realise that there was a real risk or possibility of death occurring from his conduct. So, we cannot find him guilty of murder in terms of s 47(1) (b).

However, it is our considered view that the first accused's conduct was short of the conduct of a reasonable person. He negligently failed to realise that death could result from his conduct. A reasonable person placed in the same circumstances as the accused would have foreseen the possibility of death happening due to a protracted and vicious assault using an iron bar. According to the evidence of Naume Madziro, on 10 July 2023, the deceased was still swollen as a result of the assault of 8 July 2023. A reasonable person would not have gone on to inflict another prolonged and more vicious assault on the 10th of July. This time the first

accused was using an even more dangerous weapon, an iron bar. Mr Chipunza who walked into the assault was horrified to see the first accused using an iron bar to assault the child. Mr Chipunza represents the reasonable person. A reasonable person would have guarded against using an iron bar. A reasonable person would also have guarded against a protracted assault of the child. Naume Madziro, and Mr Chipunza were of the view that the assault of 10 July 2022 was protracted and vicious. These people represent the reasonable person who would also have taken the child to hospital on the day she failed to make it to school. The child was swollen all over her body and was feeling pain everywhere. She was even vomiting some greenish subsistence. This obviously meant that things were not right in the deceased's body. Had it not for the tip off to the police, the deceased would have died in the house. May be if the deceased had been take to hospital earlier, she would have survived the infection. In view of the foregoing, we are satisfied that the first accused negligently caused the death of the deceased and is thus guilty of culpable homicide.

The next question is, is the second accused equally guilty of culpable homicide? That she is the one who reported the deceased for being mischievous to the first accused is not disputed. Whilst the State witnesses said that the deceased was not a problem child, it is very possible that the deceased was being a problem because it was confirmed that she had a boyfriend at the time. Mr Chinyai, the extra lessons teacher did confirm that the deceased would sometimes not attend extra lessons. The first accused said that he had gone to the deceased's school and had confirmed that the deceased would arrive late at school. We believe that the second accused knew the deceased better than the neighbours and the tenant. We cannot fault her for reporting to her brother how the child was behaving. He was the father and he needed to know. The second accused is the reason why the first accused person found himself on the bus to Harare to discipline the child.

What is not disputed is that when the first accused arrived on the 8th of July, the second accused had left for Kadoma. So, she played no role in the assault that was perpetrated by the first accused on the deceased on 8 July. Evidence from Naume Madziro also shows that when the assault of 10 July started, the second accused had not yet arrived from Kadoma. Naume Madziro however said that the second accused later arrived when the assault was ongoing and participated in it. The second accused disputed it saying that she only git home around 5pm after the assault was over. She even led evidence from a work colleague who gave her a lift from Kadoma to confirm her story that she had arrived home around 5 pm. However, the witness was not of much use because he said that they arrived at her place at around 5 pm, but

he just dropped her and proceeded with his journey. He did not enter her house. So, he did not see what was happening in her house at that time. On the hand Mr Chipunza said that he went to the accused's house at around 4 pm after waking up from an afternoon nap and walked into an assault. The second accused was there seated in the kitchen on the chair with the first accused assaulting the deceased. This corroborates Naume Madziro's evidence that between the second accused and Mr Chipunza, the second accused was the first to arrive. The two State witnesses could not have been lying against the second accused. The question of the exact time the second accused arrived home is not really the issue here. She could have arrived around 4 pm or 5pm, the difference in time might not be noticeable because the two times are separated by at most 60 minutes. Besides, when things or events are happening people will not be looking at their watches and recording the times. Half the time people do not really think about time. Normally people only start thinking about the time things happened when something of importance later happens or arises. That is when people start recollecting and thinking backwards. As a result, people make estimations of time and sometimes the estimations are wrong. In *casu* it is possible that the State witnesses were correct that by 4pm the second accused had arrived home. It is also possible that the second accused and her witness were correct that she arrived at 5 pm. What should be of concern here is whether the second accused arrived during or after the assault. In light of what Naume Madziro and Mr Chipunza said, we make a finding that she arrived home when the first accused was assaulting the deceased. We do not see why the two would lie about her presence if she had not yet arrived from Kadoma. If they wanted to falsely incriminate her, they would have gone further to lie that they had actually seen her assaulting the deceased

The next question is, did the second accused participate in the assault? In all fairness to the State witnesses, no one said they saw her physically assaulting the deceased. Naume said she did not see her doing so, but she said that she saw her going outside the house to get an iron bar. Naume said that when the second accused went back into the house, she then heard the deceased crying out saying "Daddy, tete muri kundikuvadza". We do not believe that on this basis we should make a finding that the second accused assaulted the deceased. We say this because Naume was outside and was only hearing words. Firstly, Daddy and tete are words that can sound the same from a distance. Besides, we were not told from what distance Naume heard these words. This is worsened by the fact that there were further sounds of the beatings that were happening. Moreover, this is the same witness who earlier on said that when the first accused started shouting at the deceased in the kitchen, she was outside and could not properly

hear what was being said. Besides, even if Naume heard the words correctly, the question is, did the deceased mean that the second accused was also assaulting her? Is it the only reasonable inference that can be attributed to these words? We pose this question in light of the evidence of Mr Chipunza who said when he entered the kitchen, he found the second accused seated on the chair. The person who was assaulting the deceased was the first accused. On this basis we do not believe that the State proved beyond reasonable doubt that the second accused physically assaulted the deceased. Our conclusion is strengthened by the fact that when Mr Chipunza entered the kitchen, he did not see the second iron bar yet Naume said each accused had taken an iron bar into the house. The question is what had happened to the iron bar that was taken into the house by the second accused when Mr Chipunza entered the kitchen? The accused persons did not expect to see Mr Chipunza. So, we do not believe that they had hidden it. In any case the first accused was actually using an iron bar to assault the deceased by Mr Chipunza when he walked in. No attempts were made by the accused persons to hide the iron bar. We even wonder whether Naume Madziro told the truth that second accused went outside and collected an iron bar.

What we can safely say is that the second accused found the first accused assaulting the deceased viciously and he continued to do so in her presence. He is said to have briefed her on what had happened and continued with the assault. The second accused took no positive step to restrain him. Instead she fuelled the assault as she was shouting that the deceased was very naughty and stubborn as she was bringing boyfriends into the house. Mr Chipunza was a witness to this. However, we cannot convict the second accused of culpable homicide on the basis of the utterances that she made about the deceased being naughty. It appears to us that in her view the first accused was doing the right thing of disciplining the child who had become a problem. Considering that she found the first accused already assaulting the child, she might not have appreciated the severe and protracted assault that the child had already suffered at the hands of the first accused before her arrival on the day in question and on the 8th of July 2022. For that reason, we will give her the benefit of the doubt.

In view of the foregoing we find both accused persons not guilty and acquitted of murder. Accused one is found guilty of culpable homicide as defined in s 47 of the Criminal Law (Codification and Reform) Act.

Sentence

In mitigation we considered that the accused is a 52-year-old first offender. He is a family man who has the responsibility of looking after his family. He committed this offence in the process of disciplining his daughter. It is unfortunate that he exceeded the limits of doing so and ended up severely injuring the child. The accused shall live with the trauma of killing his own child for the rest of his life. Already during trial, he showed that he was handling the whole situation badly as he was crying throughout the defence case. We had to hear his evidence as he was sobbing. He could not be consoled. It was clear that he did not mean for the deceased to die. This was even evidenced by the fact that for the 21 days that the deceased was admitted in hospital, he went to visit her every day. He was also buying all the medication that the doctors were prescribing to the deceased. The accused person will forever be a tormented man.

In aggravation we took into account that culpable homicide is a serious offence. The accused killed his own daughter who was aged 16 years and was about to write her ordinary level examinations. The accused had received a report from his sister that the deceased was misbehaving in that she was being promiscuous, she was bunking extra lessons, and she was getting to school late. Whilst it was necessary to discipline her, it was however not necessary to be violent with her. Discipline should be instilled within limits and it also needs to be tempered with mercy. A parent should have a heart and feel for his or her child. In this case the accused was heartless as he assaulted the deceased for hours on end on the 8th and on the 10th of July 2022. He went to the extent of assaulting her using an iron bar on her buttocks which were barely covered with a skin tight. He had ordered her to lie down and had made her to lower her pair of trousers to knee level. So, the accused was basically looking at her bare buttocks as he was assaulting her. That was very shameful. We were told that the deceased was crying, pleading with the accused asking him stop the assault, but he did not take heed. She was telling him that he was injuring her, but he did not listen. She pleaded for forgiveness, but the plea fell on deaf ears. Mr Chipunza who walked in said that he was horrified to see the accused assaulting his daughter with an iron bar. He said that the accused was very angry and could not be restrained. He was perpetrating a vicious assault on the deceased. The accused continued to assault the deceased for almost an hour after that.

The deceased was still a minor. She still had her whole life ahead of her. The accused needed to understand as a child she could go wayward and what she needed was a guiding parent. From the evidence that was led, it does not look like the accused ever gave her a chance

to explain her side of the story. He never sat down with her in order to ascertain from her what was happening. She needed to be heard as well. In terms of s 81 (1) (a) of the Constitution of Zimbabwe, 2013, children have a right to be heard. Evidence led from the State witnesses was that she had one boyfriend. Surely, that cannot be equated to being promiscuous. The extra lessons teacher said that her excuse for not attending extra lessons sometimes was that she would have come from school late. So, she was juggling school and extra lessons. The accused as the parent never cared to understand from her how she was coping. He simply took the version of his sister as the truth and severely assaulted the child. At the age of 16 years, the deceased needed counselling more than being assaulted.

What further aggravates the offence in the present matter is that after severely assaulting the child, the accused did not take her to hospital. The accused failed to observe her right to health care services in terms of s 81 (1) (f) of the Constitution. She was kept in the house for 5 more days until the police were alerted by an anonymous caller from the neighbourhood. The police took an ambulance and proceeded to take her from the accused's sister's place to the hospital. It was discovered that the deceased had developed an abscess in the buttocks where the accused was assaulting her with an iron bar. The abscess caused an infection which affected the vital organs such as the liver, kidneys, lungs and the heart. Despite being operated on, the deceased failed to recover. After two weeks she passed on.

In view of the mitigatory factors in this case the defence counsel prayed that the accused be sentenced to 800 hours of community service. The State counsel vehemently opposed a community service sentence arguing that it would trivialise the offence. She urged the court to sentence the accused to effective imprisonment and suggested a sentence of 12 years with 5 years suspended on condition of future good behaviour. In terms of s 81 (3) of the Constitution, children are entitled to adequate protection by the courts. For the reasons discussed elsewhere above, we agree with the State counsel that a community service sentence in the circumstances of the present case will be a mockery of the criminal justice system. It will not show that the courts are not doing their duty to provide adequate protection to children. Whilst the sentence that we are going to impose will no longer be able to protect the deceased, it should be able to protect children who may be victims of similar circumstances in future. In other words, the sentence should be able to deter other parents who would be offenders. Effective imprisonment is called for. This court as the upper guardian of all children needs to send a clear message to society that violence against children will not be condoned and it should stop. There is a world of difference between chastising a child and abusing a child. Whilst chastising a child is

permissible, abusing is not. See s 81 (1) (e) of the Constitution. What happened in the circumstances of the present case went beyond chastising a child. Parents should be able to draw the line between the two. A child is not chastised using an iron bar and for hours on end. It is better for parents to resort to other ways of disciplining children that are non-violent in nature.

Since justice should always be tempered with mercy, we will reduce the sentence suggested by the State counsel so as to show that we have really taken into account the mitigatory factors that were advanced on behalf of the accused.

In view of the foregoing, the accused is sentenced to:
10 years' imprisonment of which 5 years' imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving violence on the person of another and for which upon conviction he is sentenced to imprisonment without the option of a fine. Effective 5 years' imprisonment.

National Prosecuting Authority, State's legal practitioners
J. Mambara & Partners, accused persons' legal practitioners