THE STATE
versus
DAVISON CHIKOMO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 13 & 14 July 2016; 12 & 26 August 2016

ASSESSORS: 1. E.N. Barwa
2. M. Mutambirwa

Criminal Trial

R Muringani, for State
S Chisiri, for accused *pro-deo*

CHITAPI J: The accused is charged with the offence of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He resides at village 26 Chikarimatsito, Chief Makore, Gokwe. He is alleged to have caused the death of Memory Gasva by striking the deceased on the head on 15 November, 2014 at North Strateque farm, Chivhu resulting in injury from which the deceased succumbed to her death. The deceased was the accused's mother in law. The indictment alleged that when the accused unlawfully assaulted the deceased as aforesaid, he acted with the intention to kill or realized the risk or possibility that his conduct might cause death but continued in such conduct.

The matter was initially set down on 15 February, 2016. On that day ZHOU J considered the accused's defence outline and heard submissions from the accused's pro-deo counsel regarding the accused's mental state since he was alleging that he suffered a blackout and did not recall how he allegedly committed the offence. The learned judge postponed the trial to 29 February, 2016 and ordered that the accused be examined by two medical practitioners to ascertain his present mental state including his mental state at the time of the alleged commission of the offence.

The procedure adopted by ZHOU J accords with s 192 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] which provides as follows:

"192. **Trial of mentally disordered or defective persons:**

If at anytime after the commencement of any criminal trial, it is alleged or appears that the accused is not of sound mind, or if on such a trial the defence is set up that the accused was not criminally responsible on the grounds of mental disorder or defect for the act or omission alleged to constitute the offence with which he is charged, he shall be dealt with in the manner provided by the Mental Health Act [*Chapter15:06*]."

In terms of s 29 of the Mental Health Act,

"If the judge or magistrate presiding over a criminal is satisfied from evidence, including medical evidence, given at the trial that the accused person did the act constituting the offence charged or any other offence of which he may be convicted on the charge but that when he did the act, he was mentally disordered or intellectually handicapped so as to have a complete defence in terms of s 248 of the Criminal law Code, the judge or magistrate shall return a special verdict to the effect that the accused person is not guilty because of insanity…"

Subsequent to the order of ZHOU J that the accused be examined by two medical practitioners as aforesaid, the accused was duly examined. He was examined by Doctors Kajano and Dhobbie at Harare Remand prison on 7 March, 2016. The doctors reduced their findings and conclusions into writing in the form of affidavits. The affidavits were presented before ZHOU J on 14 March, 2016. Both doctors concluded that the accused was not afflicted with any mental defect and was normal, mentally stable and that there were no facts indicative of mental disorder or defect in the accused which the doctors observed "previous" to the examination. ZHOU J then postponed the trial *sine die* for a new date to be allocated for its commencement. The matter was then set down on 13 July, 2016 before me and assessors.

Despite the fact that the doctors found no evidence of any defect in the accused, the accused stuck to his defence outline filed before ZHOU J ordered that he be mentally examined. In order to enable a logical presentation of this judgment, the full content of the defence outline will be summarized later after dealing with the State evidence. It should however be made clear that the fact that medical evidence did not find that the accused was mentally disordered or suffered from a mental defect or handicap would not be a bar to the availability of such defence to the accused if proven by other evidence other than that of the two doctors who examined him. The accused did not however challenge the evidence of the findings of the two doctors.

Turning to the facts of the matter, they are largely common cause. In fact, the State did not lead any oral evidence. The State counsel sought from the defence counsel admissions in terms of s 314 of the Criminal Procedure & Evidence of the evidence of the following witnesses as detailed in the summaries of their evidence in the summary of state case

prepared by the Prosecutor General in terms of s 66 (6) of the Criminal Procedure & Evidence and served on the accused upon his committal for trial to the High Court with a copy thereof being filed of record with this court in terms of s 66 (7) of the said Act.

The evidence which was admitted was that of witnesses Emmanuel Anesu Masamha, Ruramai Sinbanda, Amos Mambwanda, Wonder Chinembiri, Sylvia Nhamo, John Shura, Priscilla Chitukuse, Ethel Chakati, Elizabeth Sithole and Doctor Godfrey Zimbwa. Since the evidence of the said witnesses was not challenged, it will be an unnecessary duplication to restate it in this judgment. It should be taken as incorporated herein by reference. Critical evidence will however be adverted to in summary. The critical evidence is as follows with reference to named witnesses:

(a) Emmanuel Anesu Masamha

Was a form one student and a juvenile aged 14 years when the incident in issue took place. He knew the deceased as a church mate and the accused as the deceased's son in law. On the fateful day, he attended a church service together with the deceased, the accused and another juvenile called Ruramai Sibanda. The service ended around 2:00pm. On the way back home from the service, the deceased gave the accused a container with traditional "maheu" to carry. On the way the team met with one Rueben Mapope who asked the accused for some maheu. The accused gave him and he drank some. The witness and the accused took turns to also partake of the maheu. Reuben Mapope proceeded on his way after partaking of the maheu.

The witness' testimony as admitted was that shortly after the accused had drank the maheu, he started complaining that his tongue was pulling inwards. He then and stated that the deceased wanted to kill him by poisoning him with the maheu. The accused with the witness increased pace and caught up with the deceased who was walking in front of them in the company of Ruramai Sibanda. On catching up with the deceased, the accused started to accuse the deceased of trying to kill him by poisoning the maheu. The deceased denied the imputation. The accused then fell to the ground. The witness, deceased and Ruramai continued walking.

The witness observed the accused picking a stone as he lay on the ground. He put the stone into a small bag which he had. He thereafter stood up from where he lay on the ground, and proceeded to where the deceased was, still accusing her of trying to kill him. The accused removed the stone which he had placed in the small bag and struck the deceased with it once on the head. The deceased cried out and started to run away. She however fell down. The

accused picked up the same stone and struck the deceased with it twice on the head as she lay on the ground. The deceased started to bleed profusely and the witness and Ruramai Sibanda having witnessed the assault and the deceased's bleeding ran away in fear. The witness sought assistance from Amos Mambwanda and Wonder Chinembiri who had a motor vehicle. The witness further reported the incident to Christopher Tigere who attended the scene with another person Anna Chauke. The witness together with Christopher Tigere and Anna Chauke then returned to the scene and found the accused seated by the road side with his hands tied with a rope. Christopher Tigere then drove the accused to Chivhu Police Station and handed him over to the police. The evidence of Ruramai Sibanda was said to be materially similar to that of the witness, hence corroborating it.

(b) Amos Mambwanda

Was driving to his home in the company of Wonder Chinembiri on the fateful day around 4:00pm. They were stopped by the witness Emmanuel Anesu Masamha and he made a report about the deceased who had been struck by a stone by the accused. The witness and his colleague left their vehicle and were led by the informant to the scene. On arrival, they observed the deceased lying on the ground and bleeding profusely from the head. Her clothes were blood soaked. They also observed the accused holding a stone and standing nearby. When the witness advanced towards the accused, the accused threatened him not to come any closer. The witness and his colleague Wonder Chinembiri disregarded the accused's threats and advanced towards him whereupon the accused dropped the stone that he was holding and threatening them with and took to his heels. The witness and his colleague gave chase and apprehended the accused. They tied his hands with a rope. They recovered the stone which the accused had used. He and his colleague helped the deceased into Christopher Tigere's vehicle and the deceased was ferried to hospital. The accused was also taken by Christopher Tigere in the same vehicle to the police station.

(c) Priscilla Chitukuse

Is a member of the Zimbabwe Republic Police and was on duty on 15 November, 2014 at Chivhu police station. She booked the accused into detention on allegations of the attempted murder of the deceased. She also booked the stone which the accused had used to assault the deceased as an exhibit. She proceeded to the hospital to check on the condition of the decease. She noted that her head had sutures. On the following morning she learnt that the deceased had passed on during the night. She formally charged the accused with murder.

She witnessed the recording of a warned and cautioned statement from the accused by the investigating officer Assistant Inspector Ethel Chakati. She witnessed the weighing of the stone which the accused used to strike the deceased with. It weighed 4, 949kg. She also witnessed the accused making indications at the scene of the crime. The witness attended at Masvingo General Hospital and witnessed the post-mortem examination of the deceased's remains

The stone which the accused used was produced by consent as exh 3. The post mortem report was produced by consent as exh 1. The post mortem report showed that the deceased was 46 years old, ± 170cm in height and weighed ± 80 kg. The doctor observed a sutured deep scalp laceration on the deceased's right front parietal area ± 4cm long; a small laceration ±2cm on the left frontal area and the deceased neck was loose and hypermobile meaning that it allowed for an unusually large range or radius of movement. The doctor attributed the deceased's death to head injury and cervical spine subluxation i.e. a dislocation of the spinal vertebra.

(d) John Shura

Had his recorded statement by the police on 28 November, 2014 produced in evidence by consent as exh 2. He attended at the scene of the assault upon the deceased by the accused around 400pm on the fateful day. He was in the company of the accused's wife Mary Matapo. On arrival at the scene, they saw the accused seated in the middle of the road with both his hands tied with a rope. The deceased was seated by the side of the road. The deceased's head was tied with a blood stained white cloth and the deceased's clothes were blood stained as well. Mary Matapo started crying accusing her husband, the accused of having killed her mother, the deceased.

The witness statement is para I read as follows:

> "I then asked the accused person Davison Chikomo as to what he had done to Memory Gasva and he responded that Memory Gasva had poisoned the "maheu" that she gave him and wanted to kill him. When the accused Davison Chikomo was talking to me, he was vomiting." (own underling)

The statement of the witness' in para 9 reads as follows:

> "I and Sylvia Nhamo then lifted Memory Gasva and placed her in the front seat where Sylvia Nhamo joined and supported her. I assisted the accused person Davison Chikomo to get into the back of the truck. Also in the back was Anna Chauke and she was joined by Mary Matapo."

The above narration sums up the critical evidence.

The accused elected to give evidence on oath. His evidence was to the following effect:

The deceased was his mother in law being the mother of Mary Matapo, the accused's wife whom he married in 2012. He stayed in Gokwe with his wife. He came to Chivhu at the instance or invitation of the deceased. The deceased did not discuss the issue that she had summoned him for but on the day following the date of his arrival, the deceased invited him to go with her to her church so that he could receive prayers and salvation because she had noticed that he was possessed by evil spirits. The deceased attended the Paul Mwazha Church whilst he was a follower of the Johanne Masowe Apostolic Church. He said that he was forced to attend the church against his will. He attended church with the deceased, Mary Matapo, Anesu Masamha and others on 15 November, 2014.

Whilst at the church service, it started to rain and the cleansing ceremony which would have involved congregants being dipped or washed in a river was not held. The accused had carried some clothes to change into after the cleansing ceremony and the clothes were in a satchel that he carried. The service ended and the team started for home. The deceased was in front and he, the accused, followed behind with Anesu. After about 1 km from the church service site, he caught up with the deceased who was seated on the ground. The deceased then told the accused that she had left some maheu for him. He was offered a cupful and took a sip. On taking a second sip he felt a root or herb on his lips. He then asked the deceased as to the type of maheu she had given him since it was mixed with herbs. The deceased did not answer. He them poured the remains of the cup into a plastic container and he noticed more roots or herbs. He said that after partaking of the sips of maheu he felt some discomfort in his stomach and felt dizzy. He fell down and started to vomit. He said that he did not recall anything after that. His next point or stage of recollection was finding himself in a police station the following day and being accused of having attacked someone with a stone the previous day. He testified that he believed that the maheu which he had sipped caused him to suffer a black out. He said that there was no bad blood between him and the deceased and that he had no reason to lie in his testimony. He lastly stated that he was now back to his normal senses.

In the written defence outline filed of record, the accused stated that he lived in the rural parts of Gokwe and that had a profound belief in witchcraft and superstition. The defence outline largely repeats his evidence and in particular he states that before the team which had attended the church service set for home after the church service, the deceased and

other family members partook of their share of the maheu which had been carried to church. He stated that for some strange reason, he was not offered the maheu at the time that other family members imbibed the drink. He outlined that the family members "left a small (*sic*) portion which was then reserved for the accused person."

The defence outline in para 5 states as follows:

> "Along the way, the deceased then extended a cup of maheu to the accused person. Upon ingesting three sips of the maheu, the accused person fell headlong on the ground. He thereupon started convulsing and crying for help as he lied on the ground clutching his abdomen but the deceased would have none of it."

The accused outlined that he did not recall what happened thereafter and only regained his clear appreciation of events on the following day.. he only became aware of allegations against him at the police station.

In paras 7-9 of the defence outline, the accused stated as follows:

> "7. He only properly recalls how he drank three sips of maheu, how he noticed there were some roots and herbs beneath the maheu in the cup that he was given by the deceased and lastly how he was immediately struck by severe and excruciating abdominal pain and stomach cramps as he fell onto the ground and thereafter suffered a mental blackout.
>
> 8. Now that the accused has regained his mental sanity, he believes that he was struck by a temporary episode of insanity as a result of the maheu which he believed had been laced with traditional poison by the deceased person.
>
> 9. The accused will further deny ever intentionally causing the death of the deceased as at the material time he had completely lost control of his mental faculties to the extent that the factual basis of the allegations had to be explained on the second day after he had fully regained proper control of his mental faculties."

Under cross examination, the accused stated that the deceased invited him to Chivhu through a telephone call wherein she first spoke to the accused's wife and then to him. When the deceased invited him and his wife to Chivhu she did not disclose her reason for inviting them. It was only on the day following their arrival that the deceased told him that he was possessed by evil spirits which needed to be exorcised without explaining further. The deceased also asked him to convert to her church to which he asked how this could work out since he did not reside in Chivhu but in Gokwe. When asked why he went along to agree to attend the deceased's church on the fateful day, he stated that he initially refused but that the deceased had insisted or was persistent.

The accused denied the evidence of Anesu Masamha that on the way back home, it was the accused who carried the container of maheu. He denied meeting with Rueben Mapope or drinking the maheu with Rueben Mapope and Anesu Masamha. He testified that

everyone else had drunk the maheu except him. He stated further that when he drank the maheu, there were small roots which were in the maheu. When asked whether he believed that the deceased had bewitched him he responded, "I will say so became it was the first time in my life that I felt so dizzy, weak and I was getting confused". He said that he vomited but did not recall whether this happened after or before he had struck the deceased with the stone.

The accused stated that he recalled that he had a satchel with his clothes but did not recall picking up a stone and putting the stone inside the satchel. He did not recall accusing the deceased of bewitching him. He denied that he attacked the deceased became he believed that she had bewitched him.

In response to questions seeking clarity by court, the accused said that when he was given maheu to drink by the deceased, he was alone or by himself. Asked how he felt when the deceased said that he was possessed by demons, he said that he was puzzled. He said that he was not happy or welcoming to the suggestion that he should convert to the deceased's church. When asked what exactly he recalled of the incident, the accused said that he remembered vomiting. When asked who he asked about the roots in the maheu, he said that he asked the deceased. When asked what came into his mind after seeing roots in the maheu, he said that he just started vomiting and did not recall what transpired afterwards. Asked as to when he next came to his senses, he answered that it was at the police station on the following day.

The above outlines of the State and defence evidence constitute the facts which the court must grapple with and assess in order to come up with an appropriate verdict. Whilst the issue of factual *caustion or actus reus* does not present a challenge to the court, it being common cause, that the conduct of the accused resulted in the death of the deceased, the same cannot be said about the accused's subjective state of mind which should accompany the factual causation in order to found criminal liability. A subjective state of mind has been described in s 12 of the Criminal Law Code as follows:

> " … a subjective test for a state of mind is a test whereby a court decides whether or not the person concerned actually possessed that state mind at the relevant time, taking into account all relevant factors that may have influenced that person's state of mind".

The court should apply a subjective test in determining an accused's person's intention. A subjective test has been defined in s 13 of the Criminal Law Code as "… whether or not the person whose conduct is in issue intended to engage in the conduct or produce the consequence he or she did". The same section provides that unless the Criminal Law Code or

another enactment provides provisions to the contrary, "the motive or underlying reason for a person's doing or omitting to do anything, or forming any intention, is immaterial to that person's criminal liability….". In the reasoning of the court, the fact that the legislature did not state or provide that a lack of motive or reason for a person's conduct is immaterial, means that it is a factor which can properly be taken into account in an appropriate case in determining whether or not the accused person subjectively formed the intention to commit the offence he or she stands charged of.

Section 15 of the Criminal Law Code defines Realisation of real risk or possibility in the following terms:

> "15 (1) where realization of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components:
>
> (a) a component of awareness, that is whether or not the accused whose conduct is in issue realized that there was a risk or possibility, other than a remote risk or possibility, that:
>
> (i) his or her conduct might give rise to the relevant consequence; or
> (ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and
>
> (b) a component of recklessness, that is, whether, despite realizing the risk or possibility referred to in paragraph (a), the person whose conduct is in issue continued to engage in that conduct.
>
> (2) ……..
>
> (3) where in a prosecution of a crime of which the realization of a real risk or possibility is an element, the component of awareness is proved, the component of recklessness shall be inferred from the fact that:
>
> (a) the relevant consequence actually ensued from the conduct of the accused; or
> (a) the relevant fact or circumstance actually existed when the accused engaged in the conduct; as the case may be.
>
> (4) For the avoidance of doubt, it is declared that the test for realization of a real risk or possibility supersedes the common law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable."

Drawing from the above tests, the court must either find that the circumstances of the case or the evidence led proved that the accused intended the consequences of his conduct. If not the court must find that on the evidence the accused realized that there was a risk or possibility that his conduct might give rise to the deceased's death or that the possibility of death resulting from his conduct was in existence when he engaged in the conduct he engaged in. Further the accused must have been reckless in that he must have continued in engaging in the conduct in issue.

The next issue is to consider or analyse in depth the accused's version of events. The accused alleged that he suffered a mental blackout and could not remember what he did after he had partaken of what he believed to have been root or herb laced maheu. At best he recalled that he vomited and nothing thereafter. Mr *Chishiri* for the accused has submitted that the court should find the accused not criminally liable on the charge on the basis that the accused became temporarily insane. In other words he urged the court to find that the accused's conduct was that of mad person who could not appreciate what he was doing. That being, the argument would then be that the accused could not have subjectively possessed an intention to commit the offence in question taking into account the provisions of ss 12, 13 and 15 of the Criminal Law Code as herein above set out. If the accused lacked the intention or was incapable of forming the intention, then he could not have foreseen the possibility of his actions resulting in the consequences which ensued and equally he could not be said to have acted recklessly.

Sections 226 and 227 of the Criminal Law Code provide as follows:

"226 Interpretation in Part V of Chapter XIV in this Part –

Mental disorder or defect means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind 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 of 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), <u>the cause and duration of the mental disorder or defect shall be immaterial".</u> (own underlining)

Subsection 4 of s 227 however excludes the availability of this defence to an accused person who has suffered a mental disorder or defect resulting from voluntary intoxication.

In *casu*, the fact that the accused may have suffered a temporary as opposed to a prolonged mental disorder is immaterial. Strictly speaking therefore there is no defence in the Criminal Law Code called temporary insanity or black out. The defence should aptly be described as mental disorder. The onus to prove such defence lies on the accused person. Section 18 (3) and (4) of the Criminal Law Code provides as follows;

"18 <u>Degree and burden of proof in criminal cases</u>.

(1) ……

(2) ……

(3) Where this code or any other enactment imposes upon a person charged with a crime the burden of proving any particular fact or circumstance, the person may discharge the burden by proving that fact or circumstance on a balance of probabilities.

(4) Except where this code or any other enactment expressly imposes the burden of proof of any particular fact or circumstance upon a person charged with a crime, once there is some evidence before the court which raises a defence to the charge, whether or not the evidence has been introduced by the accused, the burden shall rest upon the prosecution to prove beyond a reasonable doubt that the defence does not apply.

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 twenty seven, 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 upshot of s 18 of the Criminal Code can therefore be summarised as follows:

That:

"(a) the court can only convict an accused person of an offence provided for in the Criminal Code if the State has proved the elements of such offence beyond a reasonable doubt.

(b) where in terms of any provision of the Criminal Code, the burden of proof is imposed on an accused to prove any fact of circumstance, the degree or standard of proof reposed on the accused person is upon a preponderance of probabilities.

(c) Save for crimes where the criminal code imposes the burden of proof upon the accused, should any evidence be introduced in court which amounts to a defence to the charge before the court, the prosecutor bears the onus to disprove such the defence beyond a reasonable doubt. It is also important to note that it is immaterial as to whether it is the accused who has introduced such evidence as raises a defence. It may well be evidence introduced by a State witness. The position postulated herein reasonates well with the common law position which previously prevailed that the accused bears no onus to prove or convince the court of his defence. Once he raises a defence, the duty fell upon the prosecution to disprove the defence beyond a reasonable doubt see *R* v *Defford* 1937 AD 370 at 373, *S* v *Katsiru* 2007 (1) ZLR 364; *S* v *Munyai* 1986 (4) SA 712 (SC); *S* v *Kuipei* 2001 (1) ZLR 113; *S* v *Chindunga* SC 21/02. The previous position has therefore been codified and also clarified by requiring a court to consider any lawful defence to the charge raised during or at trial notwithstanding who has raised it and only dismissing such defence where it has been proven by the State beyond a reasonable doubt not to apply. See also *S* v *Charzen & Anor* 2006 (2) ASCR 143 (SCA); *S* v *Mafiri* 2003 (2) SACR 121 (SCA); *S* v *Shackell* 2001 (2) SACR 185.

(d) With respect to the defences of mental disorder or defect and acute mental or emotional stress, it is the accused who bears the burden to prove them on a balance of probabilities. If he pleads them and seeks to avoid liability on the basis that he suffered from one or other or all of them when he committed the crime charged. In

> other words where the accused pleads lack of intent, a foresight or *mens rea* on the basis that he was suffering from the said disorders or defects, he must prove them on the balance of probabilities. This case turns on this area of the law.

The accused's counsel correctly submitted on the authority of *State* v *Tsetse Fombe* HH 16/15, a decision of HUNGWE J that the accused bears the onus to prove his plea of a "temporary insanity" or a black out as he put it. The crux of the defence is that it must be proved that the accused suffered from a mental disorder or defect at the material time that he committed the *actus.* It should further be proved that as a result of the mental disorder or defect affected his ability to appreciate the wrongfulness of his conduct or to control it.

The defence counsel has submitted correctly that the two medical reports compiled after the examination of the accused do not describe the accused's mental state when he committed the act he is charged of. He further submitted that the reports should be considered irrelevant in the determination of this case. The reports are of course relevant in so far as they certify the accused to be *compos mentis* and able to appreciate the proceedings.

Before the court can make a finding that the accused suffered from a mental defect or disorder when he committed the offence, there should be evidence which is clear and convincing on a balance of probabilities from which the court can conclude that the defence has been proved. The accused bears the burden to place such evidence before the court. There was no expert evidence presented before the court either in the form of a psychiatrist or psychologist report dwelling on the accused's mental state at the critical time. Such evidence should invariably be placed before the court because the defence of a mental condition is a specialized one for which the court would not ordinarily be qualified to rule on without the benefit of expect evidence. The expert evidence would have assisted the court determining whether the accused could tell right from wrong or whether the accused could control himself and more importantly whether the mental defect or disorder if proved led to his impulsive behaviour. The accused in this case clearly did not prove his defence as required by law. See *S* v *Mutunga* HH 23/13 cited by the State.

The proved facts show that the accused must have appreciated what he was doing. From the admitted evidence led by the State, the accused cannot be said to have been temporarily insane. What happened was that the accused thought or entertained the belief that the deceased wanted to harm or bewitch him. He formed his belief after he had partaken of the maheu which he believed to have been laced with herbs. Although the deceased denied that she had laced the maheu, the accused did not believe her. The fact that the accused

vomited cannot be conclusive that the maheu was laced with poison. The same goes for the revulsion of the stomach which the accused says he experienced. It is common that when a person ingests a foreign substance and believes that it is harmful, such person can throw up and once one throws up the stomach gets upset.

The evidence of Emmanuel Anesu Masamha clearly shows that the accused believed that the deceased wanted to bewitch him because the accused made the accusation. The accused's actions were not spontaneous. He is said to have fallen to the ground after entertaining the belief that he had partaken of laced maheu. He picked up a stone and placed it in the bag which he was carrying and proceeded after the deceased still accusing her of wanting to bewitch him. He remembered that he had put the stone in the bag and opened the bag. He removed the stone and struck the deceased on the head with it. The deceased ran away but the accused followed in pursuit and struck the deceased twice on the head as she lay on the ground where she had fallen. He threatened people who sought to disarm him of the stone.

The accused testified that the deceased had accused him of being possessed by demons. The deceased had sought to influence the accused to change his religious sect to hers. The accused was not receptive to this. The court formed the view that the accused was at the material time under a lot of pressure or stress which continued to build up and his belief that the maheu was laced was the last straw or provocative act which played on his mental state. The State counsel has submitted that the court should consider the defence of witchcraft as having arisen in the matter. This is not however the defence which the accused relies upon. The provisions of s 18 (3) of the Criminal Code are clear that the State would have no onus to disprove any defence arising where the accused has proferred the defence of mental disorder. Even if the court is wrong in so holding, the court does not accept that the accused acted out of a belief that he had been bewitched but that the accused must have acted when his mental state was affected from a build-up of stress following the culmination of several factors as herein before set out.

In the court's assessment, the accused acted under a state of diminished responsibility arising from emotional stress. Section 218 of the Criminal Law Code provides as follows:

> "218 Diminished responsibility to operate in mitigation not as defence
> (1) If at the time when a crime is committed the capacity of the person committing it-
> (a) To appreciate the nature of his or her conduct or that his or her conduct was unlawful; or
> (b) To act in accordance with an appreciation of the kind referred to in paragraph (a);
> Is diminished on account of acute mental or emotional stress, or partial mental disorder or defect, such diminished responsibility shall not be a defence to the crime, but a court

> convicting such person shall take it into account when imposing sentence upon him or her for the crime.
> (2) If the acute mental or emotional stress or partial mental disorder or defect, is brought through the person's own fault, a court may regard such person's responsibility as not having been diminished.
> (3) Where the capacity of a person to appreciate the nature or unlawfulness of his or her conduct or to act in accordance with such an appreciation is affected by intoxication or provocation, Part IV or IX, as the case may be, shall apply to such person.
> (4) For the avoidance of doubt it is declared that where a mental disorder or defect is such as to negate rather than diminish the capacity of the person suffering from it to appreciate the nature or unlawfulness of his conduct or to act in accordance with such an appreciation, the person shall be entitled to a complete defence in terms of section *two hundred and twenty-seven.*"

In the light of the absence of acceptable evidence of mental disorder or defect, the onus wherewith rested on the accused to prove on a balance of probabilities, the court finds that the accused failed to prove that he suffered from a mental disorder or defect of the mind. The court however finds that the accused did not appreciate the nature of his conduct or its unlawfulness because his capacity was diminished on account of emotional stress. Such diminished responsibility under which the accused acted is not a defence to the charge but it is a factor of mitigation. The accused is therefore found guilty of murder as defined in s 47 (1) (b) of the Criminal Law Code in that acting under diminished responsibility he nonetheless realised the possibility that his conduct could cause death but continued in that conduct despite the risk or possibility of the death of the victim he attacked, namely, the deceased.

Sentence:

The court made a finding that the accused committed the murder whilst suffering from a state of diminished responsibility. Such state of diminished responsibility was not self-induced. The findings made by the court were that the accused acted under a buildup of severe emotional stress which diminished his capacity to appreciate the nature of the unlawfulness of his conduct. Section 218 of the Criminal Code as hereinbefore referred to enjoins the court to consider such state of diminished responsibility as a mitigating factor in considering sentence. The extent to which such a state of mind should weigh on sentence is circumstantial in that each case is considered on its own facts and no hard and fast rule can be laid out.

Diminished responsibility not is defined in the Criminal Code. It is however a condition which describes an impaired or unbalanced mental state. It is a state of mind which

–negates a finding that the accused suffering from such a state of mind possessed a capacity to pre-mediate or form a specific intent to commit the offence or as in this case to murder the deceased. The defence falls short of insanity in that with instantly the insane accused is unable to form any intention nor to appreciate the nature of his actions.

Cases of murder committed in circumstances of diminished responsibility must perforce present a challenge to a sentencer. CHIDYAUSUKU J (as he then was) was faced with this dilemma in the case of *S* v *Stephen* 1992 (1) ZLR 115 H quoted by the accused's counsel. The learned judge reasoned that the accused was technically guilty on account of the provisions of the law in that although the accused suffered from diminished responsibility he was still responsible at law for his actions. The facts therein were slightly different in that, in the said case, medical evidence was led which established that the accused acted in a state of hysterical dissociation in which he only had a minimal degree of self-control.

In the instant case, no medical evidence was led to explain the accused's state of mind when he committed the offence. Notwithstanding the lack of medical evidence in this case, the court was nonetheless satisfied on the evidence from state witnesses and surrounding facts that the actions of the accused were consistent with those of a person who suffered from a degree of mental impairment which affected his ability to be in full control of his actions. There is no onus upon an accused to prove diminished responsibility as opposed to when he pleads temporary mental disorder. All facts of the case are considered medical or otherwise when considering whether diminished responsibility existed and affected the accused's state of mind.

In the *Stephen* case (*supra*), the learned judge reasoned that since the accused did not do anything to induce his condition, no moral blameworthiness could be attributed to him. *In casu* however, the position is slightly different on the facts. The accused allowed anger to build in him. The anger and emotions which diminished his responsibility arose from matters which could have been resolved in more peaceful ways. The fact that the accused felt pressured to submit to the deceased's religion and the deceased's insistence that the accused was possessed by evil spirits which required cleansing as well as the fact of accused believing that the deceased wanted to bewitch him are matters that could have been dealt with through dialogue as opposed to the accused allowing them to inure in his mind thereby building up emotions in him. It is however the issue of what moral blameworthiness to apportion to the accused which presents a challenge to the sentencer.

The degree of moral blameworthiness is not very high in this case. The State counsel did not submit otherwise. What he submitted was that the only aggravatory feature was that human life whose sanctity should be upheld as entrenched in s 48 of the Constitution had been lost. Counsel further submitted that the accused should not have been angered by the deceased's advice that he should change religious denominations of worship. It is however noted that the deceased did not only urge the accused to switch churches as submitted by the State counsel. She also accused the accused of being possessed by demons which needed to be cast out. The deceased unduly prevailed upon the accused to attend her church for purposes of casting out demons and cleansing and he did so not by choice but through the deceased's persistence. The state counsel also quoted the cases of *S* v *Shabangu and Others HB* 59/10 and *S* v *Ncube* SC 149/04 in seeking to persuade the court to pass a sentence in the region of 15 years imprisonment. The facts and circumstances of the two cases are totally different and the sentences imposed in those cases would be inappropriate *in casu*.

The fact that the accused acted in a fit of rage or lost temper or allowed his emotions to build up to stress levels should not by itself be mitigatory. This is so because society expects that its members should keep their emotions and tempers under control. The critical consideration is to examine the circumstances which would have led the errant member to fail to exercise self-control or control his emotions. The circumstances which led the accused to act unlawfully have been canvassed. They are matters which could have been dealt with peacefully but it is accepted that they are grave enough to lead a reasonable person to lose self-control though he should be dissuaded from doing so.

The court has considered the submissions made by the accused's counsel. He correctly conceded that the offence of murder is very serious and correctly submits that the court should nonetheless not lose sight of the accused's personal circumstances.

The purposes of punishment are varied but can be said to encompass the following broad purposes; deterrence, retributive, preventive and reformative. Deterrence is considered in two parts, namely general and individual deterrence. The accused is a first offender and there was no evidence led that he is of a violent disposition or a danger to society. There is therefore little to be served by way of individual deterrence as the conduct of the accused appears to have been out of character. As regards general deterrence, this must be considered against the back drop that there would appear to be no evidence that punishing an offender has the automatic effect of deterring would be offenders similarly minded. In this case, since the accused acted under diminished responsibility, the court will not overemphasize the

general deterrence aspect. It will nonetheless implore members of society to exercise self-restraint and control in their dealings with one another.

The accused is an unsophisticated young man with a strong rural background. He was about 22 years when he committed the offence which as already indicated resulted from conduct out of his character. The court agrees that the accused can rehabilitate into a useful member of society. He expressed remorse at his misdeed. He will for the rest of his life live with the stigma of being coined a murderer who took the life of not just another member of society but that of his mother in law.

What weighs against the accused are societal interests. Violence as a method of dispute settlement should not have a place in modern society. The sanctity of life should be emphasised whenever a life is unlawfully taken. Fortunately the need for deterrence does not really arise for serious consideration because of the circumstances of the case and the finding of diminished responsibility. The interests of society are properly served neither by the imposition of too harsh a sentence nor by one that is too lenient. The circumstances of each case should be rightfully weighed. It is however hardly possible to please of satisfy every member of society as to whether a sentence in a particular case is appropriate. The bereaved will call for a harsh sentence whilst those on the accused's side will call for leniency.

I propose to be guided by the remarks of the court in the South African Appeal Court case of *S* v *Ingram* 1995 (1) SACR 1 (A) at 8 (1) – 9 (b) where SMALLBERGER JA with HEFER and NEINABER JJA concurring said:

> "It is trite law that the determination of an appropriate sentence requires that proper regard be had to the triad of the crime, the criminal and the interests of society. A sentence must also, in fitting cases, be tempered with mercy. Murder in any form remains a serious crime which usually calls for severe punishment. Circumstances however vary and the punishment must ultimately fit the true nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence, but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so regard must be had to the objects of punishment. In this respect, the trial judge held in my view correctly that the deterrent aspect of punishment does not play a major role in the present instance. The appellant is not very likely to repeat what he did. Deterrence is therefore relevant in the context of the effect any sentence may have on prospective offenders."

The court finds the above remarks to be good jurisprudence and do not detract from the approach adopted by courts in this jurisdiction. I do not consider that whilst society must and does view the offence and accused's conduct in this case with abhorrence, reasonable thinking members of society are not likely or expected not to demand too harsh a sentence in this case where the accused acted under a diminished degree of responsibility.

I have considered the cases cited by the defence counsel namely *S* v *Romer* 2011 ZASCA 46, *S* v *Gambanga* 1998 (1) ZLR SC and *S* v *Nemukuyu* 2009 (2) ZLR 179 (H). I have also considered the following cases *S* v *Mnisi* 009 (2) SACR 227 (SCA); *S* v *Marx* 2009 (2) SACR 562 € ; *DPP* v *Mngoma* 2010 (1) SACR 427 (SCA) being cases in which the court considered diminished responsibility as a mitigatory factor in assessing sentence. The bottom line is that the court should in every case where diminished responsibility is established treat each case on its facts. No hard and fast rule should be followed or laid out.

It was brought to the attention of the court that since his arrest on 15 November, 2014, the accused has been in custody. Albeit not being a serving prisoner, it must be accepted that the accused was nonetheless kept in prison pending trial without enjoying his freedom. It is trite that in terms of s 69 (1) of the constitution, an accused has the right to trial within a reasonable period. The accused's trial was initially set down on 15 February, 2016. It however, became necessary to commit him for medical examination in terms of the Mental Health Act in view of the circumstances surrounding the commission of the offence. The accused was duly examined on 7 March, 2016 and his trial was reset for 13 July, 2016. I do not consider that in all the circumstances of this case the accused was not afforded a hearing within a reasonable period. It is also trite that the period that an accused is detained prior to his trial and conviction does not form part of the sentence. Pre-trial incarceration is however a factor to be taken into account in assessing sentence and is not considered in isolation but together with other relevant circumstances of the matter.

In casu, the period that the accused has been in custody pending the completion of his trial is almost 2 years. The period is substantial. The period can fairly be considered to have achieved a certain degree of the ends of punishment, namely retribution, rehabilitation, prevention as well as individual and general deterrence. MWAYERA J in *State* v *Pritchard Zimondi* HH 179/15 stated as follows in considering pre-trial incarceration as a mitigating factor;

> "In passing sentence then, the pre-sentence time of incarceration will be taken as part of punishment already served and suffered…. The court is alive to the fact that prison life is not easy for the obvious infringement of dignity and freedom. Further we are alive to the fact that from the time of the commission of the offence, that is 24 April, 2012, the accused has suffered anxiety over uncertainty as regards his fate with a murder charge hovering over his head. The period of suspense is certainly traumatic and the situation worsened by incarceration…" See also *State* v *Vincent Mpofu* HB 99/15.

In my view the apt observations of MWAYERA J apply with equal force in this case. Prison conditions are harsh with overcrowding and other vices which are known to occur

amongst inmates. Pre-trial incarceration does not offer the inmate freedom to participate in any prison programme and a remand prisoner's life is routine because he is presumed innocent until proven guilty although he does not enjoy freedom outside the walls of prison just like a serving prisoner. The fact of pre-trial incarceration and its length weighed against the finding of diminished responsibility for which I am unable to gauge the degree of moral blameworthiness to apportion to the accused, taken together with the totality of other factors I have alluded to constitute compelling reasons to sentence the accused to a term of imprisonment wholly suspended on conditions of good behaviour.

Taking into account all the circumstances of this case relative to the commission of the offence and the accused both specifically alluded to herein and as submitted by counsel in their submissions it being noted that I have taken them into account, the appropriate sentence in exercise of my discretion to be as follows:

3 years wholly suspended for 5 years on condition that the accused will not during that period commit an offence involving the unlawful killing of another human being for which upon conviction he is sentenced to serve a term of imprisonment without the option of a fine.

National Prosecuting Authority, State's legal practitioners
Rubaya & Chatambudza, accused's legal practitioners

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