

THE STATE
versus
JACOB MAUNDE
and
LEORNARD JAMBWA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 9, 10, 11 May & 23 November 2022

ASSESSORS: Mr Chimonyo
Mr Gweme

Criminal Trial

T Mukuze, for the State
C Damiso, for accused 1
M Moyo, for accused 2

MUTEVEDZI J: The two accused persons were initially jointly charged with two others. They all faced the crime of murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (The Criminal law Code). Just before the court could pass judgment accused 2 defaulted. The prosecutor applied for a warrant of arrest to be issued against him which the court did. The State further applied for a separation of trials to enable the court to pass judgment in relation to accused 1. The application was granted. The verdict at the end of the judgment therefore relates to accused1 only.

On the allegations the State alleged that one or both of them unlawfully assaulted Clever Muuduri all over his body with fists, booted feet and an iron bar, realising that there was a real risk or possibility that their conduct may cause death but persisted with that conduct despite the real risk or possibility. The deceased succumbed to the injuries he sustained from the assault. Their two colleagues were acquitted at the close of the prosecution case.

Both of the accused pleaded not guilty to that charge. Accused 1's defence outline was that there was a history of strife and sour relations between him on one hand and the deceased and his father on the other. He said on the fateful day, he was drinking a locally brewed illicit drink commonly called *chikokiana* at the home of *Yeukai Chigomero*. He was in the company of accused 2 and Spencer *Dube* who was accused 3 in this case before his acquittal. At the beer drink, a scuffle brewed between deceased's father *Nhamo Muuduri* and accused 2. The fight only ended after the intervention of other imbibers. The deceased and his father left the beer drink and proceeded to their homestead. During the fight the deceased had struck accused 1 with a knobkerrie. A while after the deceased and his father had left, accused 1 and 2 also left headed to their respective homesteads. Their route home took them past *Nhamo Muuduri* and the deceased's homestead. As they passed that homestead, the deceased and his father suddenly emerged, one brandishing an axe and the other a knife. They chased after the accused persons. They were aggressive and menacing. The accused feared for their lives. Because of that fear, accused 1 says he outran his colleague accused 2. After some distance, he realised that his friend could be in danger. He turned back to check on him. He then found that a fight between his friend on one hand and the deceased and his father on the other was ongoing at the homestead of Spencer *Dube* who was accused 3. Accused 2 was being severely assaulted. The assailants had managed to tie a rope around his neck and were choking him. Accused 1 says he then had no choice but to attempt to rescue his friend. He kicked the deceased in the chest. The deceased fought back by attempting to strike accused 1 with an axe. Before the axe hit him, accused 1 said he struck the deceased with an iron bar on the head which he had picked from the ground at the 'battle field'. He said he had no intention to kill the deceased. When he struck him, he was only defending himself. He genuinely thinks that if he had not taken that action it was him who could have died that day.

Accused 2 said he only knew the deceased as a member of the community he lived in. There was nothing else between them. He also denied attacking the deceased or causing his death. Instead, he alleged that the deceased and his father were the assailants who actually wanted to kill him. He stated that he was rescued by accused 1 from being killed by the deceased. He was also rescued by Spencer *Dube* and *Adrien Kugara* from the attacks by deceased's father. Whatever he did, he was acting in self-defence.

The State's case

The state opened its case with an application to tender the post-mortem report compiled by the pathologist who examined the remains of the deceased to ascertain the cause of death. It was uncontentious. We duly admitted it. The prosecutor also applied to produce the accused persons' confirmed warned and cautioned statements. There were no objections by the defence and the statements were accordingly admitted into evidence. There is nothing spectacular about the statements. They are a replica of both accused persons' defence outlines. Additionally the state sought to produce the certificate of weight of the weapon that was used to strike the deceased. Again there were no protestations by the accused. Oral testimonies were called from witnesses as shown below. Their evidence is paraphrased.

1. Nhamo Muuduri (Nhamo)

Nhamo was father to the deceased. His evidence from the time he picked a fight with accused 2 when they were drinking *chikokiana* until he left for his homestead falls squarely into the defence outlines of accused persons. It begins to take material differences from the time the accused passed through his homestead enroute to their respective homes. He said when they were passing through, they threatened the deceased by telling him that they would haunt him until he walked in the air. *Nhamo* said then, he was in his maize field. They exchanged insulting words with the deceased. The accused continued walking towards *Spencer Dube's* homestead. The deceased who apparently did not take the insults lying down followed the accused. *Nhamo* said he called after him to restrain him but the deceased did not take heed. He pursued the accused. Accused 1 and 2 were both running away with the deceased chasing them. The witness said it was then that he decided to follow them. The chase led both the hunter and the hunted to *Spencer Dube's* homestead. There the deceased and accused 2 got into a fight. It was at that stage that *Spencer Dube* arrived. He noticed *Nhamo* attempting to restrain the two fighters. *Spencer* proceeded into one of the houses where he pulled out an iron bar. He walked to where *Nhamo* was trying to separate the fighters. He dropped the bar. *Adrian Kugara*, who was accused 4 before his acquittal struck *Nhamo* with a brick. In the meantime, *Spencer* was also hitting the witness with a machete and at the same time holding him by his dreadlocked hair. Accused 1 picked up the iron bar which had been dropped on the ground. He hit the deceased with it. *Nhamo* added that he could not move closer because he was unable to walk after being assaulted by accused 3. The deceased fell down. The accused threw bricks at him and mocked *Nhamo* that he was now on his own because his defender was stricken. The witness said the deceased was struck with the iron bar three times. His uncle and wife later arrived and together they ferried the deceased to

hospital where he was pronounced dead on arrival. A report was then made to the police. Whilst denying that there was bad blood between him and the accused persons, he confirmed that one of the accused persons was in love with his minor daughter and he had reported them both to the police and to the village head. He denied that the accused had either been provoked or were defending themselves. He was extensively cross examined.

2. Andrew Sonto

He corroborated the skirmishes between accused 2 and *Nhamo* at the beer drink. His evidence also supported the accused's defence outlines. He was together with the accused as they went home using the route that passed through *Nhamo's* homestead. When they got there *Nhamo* and the deceased chased accused 1 and 2. The two ran away because they feared that the deceased and his father had weapons. The witness said Spencer, Adrian and he followed from behind as the deceased and his father chased the accused. *Nhamo* was holding a weapon commonly referred to as an okapi knife. Spencer and Adrian later decided to follow the pack to restrain them from fighting. The witness also followed. When he was near *Chipo Dube's* homestead he heard accused 2 shout out that he had been stabbed. Soon after he arrived, he took *Chipo Dube* and got into one of the houses at the homestead wherein he remained until the fracas had subsided. He did not witness how the deceased was assaulted.

3. Kudakwashe Banda

He said he was the deceased's friend. On the day in question towards sun set the witness was going to collect his cattle for penning. He met both accused persons. Accused 1 was in front with accused 2 following. Accused 1 was holding a stone which he however did not throw at anybody. The accused passed him. Soon after he met the deceased person who was holding an axe. He used the blade of the axe to dig out a stone from the ground. He then broke the stone into two and held the pieces in his hand. He ran after the accused. When he was close to them he hit accused 1 with one of the stones on the back. The witness tried to restrain the deceased but he was told not to worry about him. The accused ran towards *Chipo Dube's* yard with the deceased still in pursuit. The deceased caught up with accused 2. He tied accused 2 on his neck with what the witness described as 'charcoal' sticks. Sensing the danger accused 2 was in, accused 1 came holding an iron bar which he had taken from one of the store rooms at *Chipo Dube's* house. He held it high. Deceased was at that time sitting abreast accused 2 who had also been stabbed by deceased's father. Accused 1 then struck the deceased with the bar three times on the head. When they were fleeing from the deceased

and his father, accused 2 had failed to run into the yard through the gate. He was caught before he could get over the fence. The witness was clear that when accused 1 came with the bar he wanted to assist accused 2 who was under siege from the deceased and his father. The witness also confirmed the acrimony which existed between the accused on one hand and *Nhamo* and the deceased on the other.

4. Blessing Dosvora

He was the investigating officer. His evidence related to how he conducted his investigations and arrested the accused persons. Nothing much turned on it.

With that evidence, the state closed its case. Soon thereafter, counsel for accused 2, 3 and 4 applied for discharge at close of state case. As already indicated the applications for accused 3 and 4 were successful. That for accused 2 was dismissed. We indicated then that the reasons for its dismissal will be in the main judgment. The starting point will be the incorporation of the court's *ex tempore* ruling on the application for discharge on that date. Below we state the reasons.

The law on discharge at close of state case

The application for accused 2's discharge at the close of the prosecution's case was made in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The law relating to such applications was laid out in *S v Kachipare* 1998 (2) ZLR 271 (S). The principle which can be discerned from that and other authorities is that where one or more of the following prerequisites exists and an accused makes an application to be discharged at the end of the prosecution case, the court has no discretion but to so discharge him. The preconditions are that an application of this nature will succeed where:

- i. there is no evidence to prove one or more essential elements of the offence charged or
- ii. there is no evidence upon which a reasonable court acting carefully might properly convict or
- iii. the evidence led on behalf of the state is so manifestly unreliable or has been so discredited under cross examination that no reasonable court can safely act on it.

In this case the evidence which linked accused 2 to the commission of the offence was led from *Nhamo Muuduri*. There is evidence that the entire episode which ended with the deceased's death started off with the fights between accused 2 and *Nhamo*. Accused 2 was fingered out by the same witness as having participated in provoking the deceased when they passed through *Nhamo's* homestead. He alleged that it was accused 2 who fought with the deceased until the deceased died. In his own defence, the accused does not deny the fights with the deceased. He alleges self-defence. With that evidence, the state had clearly proffered a *prima facie* case which posed questions that accused 2 was required to answer. It was not possible to discharge him at the close of the state's case. Admittedly, the evidence of *Nhamo* was shaky to say the least. The Court however noted that there was other independent evidence from both *Andrew Sonto* and *Kudakwashe Banda* that confirmed that the accused 2 engaged in a fight with the deceased. At that stage and with that evidence unrebutted accused 2, would be convicted of murder or its competent verdict of culpable homicide or assault.

In addition, the prosecutor opposed the application arguing that accused 1 and 2 and their colleagues had acted in common purpose to murder the deceased. The application of the doctrine of common purpose was discussed in the case of *Tungamirai Madzokere and Others v The State* SC71/21. Although its applicability is no longer as straight forward as it used to be under the common law it still remained key in the court's decision to place accused 2 on his defence. His role could not be separated from that of accused 1. It was for those reasons that the court dismissed accused 2's application.

Accused 1- Jacob Maunde's Defence case

He incorporated his defence outline into his defence case. He narrated in detail how the fight between accused 2 and *Nhamo* panned out. That fight between the two at the beer binge illustrated the levels of animosity that existed between the two camps. When the fight had been disrupted by the intervention of other imbibers, accused 1 says *Nhamo* pretended that the dispute was over. The accused however kept an eye on *Nhamo* when he hugged accused 2 and asked that they buy beer together. He noticed *Nhamo* stealthily attempting to draw a knife from one of his trousers' pockets. He immediately knew that *Nhamo's* declaration that the fight was over was just a ruse. He ran to alert accused 2 and pull him away from *Nhamo's* grip. Those actions did not go down well with both *Nhamo* and the deceased who were bent on taking their revenge. It led to the deceased assaulting accused 1 with a knobkerrie. Other villagers once again intervened but not before condemning *Nhamo* and his son, the deceased for their waywardness. *Nhamo* and the deceased later left the beer

party like indicated in the accused's defence outlines. He then jumped to the time they passed through *Nhamo's* homestead *Nhamo* poured out vitriol calling him and his colleagues all kinds of names including that they were sons of prostitutes. That led to *Nhamo* and the deceased chasing the accused as earlier narrated. Accused 1 and 2 ran for dear life towards *Chipo Dube's* homestead. Accused 2 unfortunately overshot the gate to the homestead. He was caught by the pursuers. Accused 1 says he then heard accused 2 shout that he had been stabbed by *Nhamo*. It was that cry for help which made him turn back to try to assist his colleague. When he was checking to see where accused 2 had been stabbed he saw *Nhamo* coming from behind him. He thought about going forward but the deceased suddenly attacked him from that side. The deceased wielded a knife in one of his hands with which he struck accused on the right arm. He also struck him on the legs. The accused actually showed the court scar marks from that attack. Accused 1 says he pretended as if he wanted to flee but suddenly turned around and kicked the deceased in the chest. He fell. To his horror the accused saw *Nhamo* menacingly holding an axe and approaching him. He had no choice but to face his attacker. At the same time, the deceased was approaching from the back. He said he could not run away. There was a fence on one side and trees on the other. He couldn't jump the fence because his legs were painful from the earlier assault by the deceased at the beer drink. The deceased came closer and closer with knife in hand. The accused once again kicked the deceased and he fell. He then stood with his back against the *lantana camara* plant which served as a hedge at the homestead in a bid to ensure that no one would attack him from the backside. His ordeal was unfortunately not over. *Nhamo* attacked once more. This time with an axe. Accused says he was saved by the arrival of Spencer at the scene. Spencer grabbed *Nhamo* from behind. At the same time, the deceased got up and angrily charged towards accused 1. He still had the knife. Close to the fence there were poles lying there which were being used to repair the fence. *Nhamo* was still being held by Spencer with his hands on his sides but still holding the axe. He threw the axe towards the deceased who grabbed it. Accused 1 says he had seen an iron bar which was lying close to the poles. He picked it up. The deceased was about to strike him with the axe he had been given by his father but before he could do that the accused says he threw the iron bar at the deceased. It hit him on the head. The deceased fell to the ground. The accused says he was angry and scared at the same time. He went over to the deceased and attacked him with open hands. He did not suspect that the deceased was seriously injured because he actually got up into a sitting position but looking downwards. When accused looked up, he saw *Nhamo* in only a pair of

shorts and looking very dusty. Earlier *Nhamo* had been wearing a pair of trousers. Spencer thought the deceased was badly injured when he saw him slump to the ground. He contacted a teacher from the local school who owned a car. He came and ferried the deceased to hospital. The accused then went on to narrate the happenings relating to events which occurred after the fight. They are not material to the resolution of this case and therefore need not be repeated.

After his testimony, the accused 1 did not call any other witnesses or evidence. He closed his case.

Accused 2- Leonard Jambwa's defence case

Like accused 1, he did not have any witnesses. He testified in his own defence. His testimony began from his altercation with *Nhamo* the day before the deceased's death. He told the court that *Nhamo* had attacked him at another beer party. His testimony was essentially the same as that of accused 1. Critically his testimony relating to the events from the time they were chased by the deceased and his father was largely as narrated by the rest of the witnesses. He confirmed the testimony that he overshot the gate to Chipo's homestead. He was caught by the deceased who tied his neck with the instrument called 'charcoal' sticks. *Nhamo* stabbed him with a knife and he cried out for help. He was almost dying when accused 1 came and struck the deceased. It was then that he managed to remove the knife stuck in his flesh and charged towards *Nhamo* who fled. *Nhamo* tried to jump the fence but was caught. Accused 2 says he could not jump over the fence to pursue *Nhamo* because his leg was badly injured. All he could do was tear up *Nhamo*'s trousers. He took the knife and other paraphernalia to the police. We skipped to restate large portions of accused 2's evidence to avoid repetition because like already said it was largely the same as that of accused 1. So with that evidence, accused 2 closed his case.

Common cause issues

The uncontentious issues in this trial are the following:

- a. That the deceased died of head injuries with multiple skull fractures
- b. He sustained those injuries in a bloody fight between him and his father on one hand and the accused persons on the other

- c. There was animosity between the deceased's family and the accused persons. As a result, there had been other fights which occurred before the brawl which resulted in the deceased's death
- d. That accused 1 threw the blow that killed the deceased

The issue

Given the above, the only issue which arises for determination is whether the accused persons intended to kill the deceased. They argue that they acted in self-defence. Before dealing with the law relating to the defence of self-defence, it is important to deal with some aspects of the testimonies of the witnesses who gave evidence in this trial. The state's star witness was no doubt *Nhamo* who is the deceased's father. In fact he is the only one who gave evidence which really incriminated the accused persons. We recited the critical aspects of his testimony above. The observations which we made in relation to his evidence when we discharged accused 3 and 4 at the close of the State's case were not watered down during the defence case. In our view they still apply with equal force at this stage and are worth restating. That witness is not only the father of the deceased. *Nhamo* is a man of violent disposition who never missed a chance for a violent argument. In many respects, he provoked the fights that ended with the death of his no less violent son. The evidence we have is that he assaulted accused 2 for no apparent reason on 27 February. Accused 2 against all odds kept his cool and retreated. The next day on 28 February, he again arrived at a beer drink where the accused were present. He sought out accused 2 and challenged him to another fight. This was completely unprovoked. Unfortunately his cockiness turned up to be nothing but hot air. He lost both fights. When accused persons were passing through his homestead he again provoked the commotion that followed. It is against that background that the court noted that *Nhamo Muuduri* is a witness who had a motive to downplay his own moral blameworthiness and the significance of the role he played in the death of his son. His attempt to shift blame to the accused smacks hypocrisy. His evidence must be treated with a lot of caution because it is discredited in many ways. For instance in his narration of the ultimate fight between the two camps, *Nhamo* wanted the court to believe that Spencer and Adrien were involved from the start of the fight to the end. In fact he alleged that Spencer supplied accused1 with the weapon used to murder the deceased. That evidence was clearly at odds with the evidence of *Kudakwashe Banda* a young man who stuck the court as an honest and objective witness. He

was a friend of the deceased and had therefore no reason to support any of the accused persons. He witnessed the violence which led to the death of the deceased from its commencement until the end. Contrary to *Nhamo's* testimony *Kudakwashe's* evidence was that when the deceased was strangling accused 2, accused 1 entered a storeroom at *Chipo Dube's* residence where he retrieved an iron bar which he then used to strike the deceased three times on the head. He further said Spencer and Adrien only arrived at the scene when the deceased had already been struck. There is no way then that Spencer could have supplied accused 1 with the murder weapon as alleged by *Nhamo*. *Kudakwashe Banda's* evidence was corroborated by that of *Andrew Santo* who confirmed that both Spencer and Adrien were behind the protagonists and only arrived at the scene much later. *Nhamo* equally wanted to persuade the court to believe that when he chased the accused he only wanted to restrain his son from fighting with the accused. That again is not supported by the evidence which the court heard. He was armed when he went after the accused persons. The accused themselves did not have any weapons on them. That in our view was not synonymous with a person who wanted to seek peace by mediating between battling parties. A mediator who embarks on a peace seeking mission armed to the teeth will not be viewed with any neutrality. We mention these flaws in *Nhamo's* evidence because his testimony is crucial in the determination of whether or not the accused persons' defences succeed. In the final analysis *Nhamo* struck us as an untruthful witness who wanted to colour his evidence to cover his shame for instigating the violence that ended up with his son dead.

The defence of self-defence or defence of person

At common law, the defence of self-defence used to be a composite one encompassing defence of self, of third parties and of property. The codification of criminal offences and the defences to those crimes saw the separation of the defence of property from the defence of person. The defence of self-defence is now provided for under s 253 of the Criminal Law Code. Its new nomenclature is defence of person. It still includes the defence of third parties. The unbundling however resulted in existence of the defence of property as an autonomous defence under s 254. The requirements which must be satisfied before the defence of person can succeed are stated in s 253 as follows:

253 Requirements for defence of person to be complete defence

(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if—

(a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and

(b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and

(c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and

(d) any harm or injury caused by his or her conduct—

(i) was caused to the attacker and not to any innocent third party; and

(ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.

(2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.

From the above provision, it is apparent that a number of requirements must be met for the defence to succeed. Paraphrased, the requirements are therefore that:

1. there must have been an unlawful attack on his person
2. the attack must have commenced or was imminent
3. the action taken must have been necessary to avert the attack and that he could not escape or avert the attack
4. the means used to avert the attack must have been reasonable in the circumstances
5. the harm caused was on the attacker and not on innocent third parties and
6. that harm was not grossly disproportionate to that which could have been caused by the unlawful attack

The above prerequisites have been explained and discussed in various authorities such that there is no need to support their application with any authorities. If however any are needed, the cases of *S v Tevedzayi* HH 206/18; *S v Sweswe* HB 184/18; *S v Nyawo* HB 245/20 and *S v Justin Watanhauka* HH 342/13 can be referred to.

Application of the law to the facts

a. Unlawful attack which had commenced or was imminent

We have found as a fact that the deceased and his father attacked the accused persons as soon as they saw them pass through the footpath close to their homestead. It actually appears like the two had pre-planned the attack because they knew that the accused could only access their residences through the footpath which passed by their homestead. It is important to note that the initial fight had ended when the deceased and his father left the beer party. The deceased and his father had no right to attack the accused as they did. The accused had done nothing except that they had actually been earlier victimised by the same

aggressors. Accused 1 was having difficulties in walking because he had been severely assaulted by the deceased with a knobkerrie. To show that they were not spoiling for any kind of violence, the moment the accused persons got the slightest hint that *Nhamo* and his son wanted to attack them, they took to their heels. The deceased and his father were however bloodthirsty. Their adrenalin shot up and like predators, they went after the accused. It therefore needs no debate that the attack was unlawful. It was not imminent but was in full swing. By the time the accused persons fought back, they were already under brutal siege by the deceased and his father.

b. The action taken necessary to avert the attack and that accused could not escape or avert the attack

The attack on the accused persons was not an event. It was a long transaction which could be traced back to the beer party at *Yeukai Chigomero's* homestead. The accused both genuinely believed that the hostilities had long ceased. They were wrong. The deceased and *Nhamo* hunted them down. The accused tried to escape but the hunters were well coordinated and maybe even more adept than them. They cornered accused 2, tied his neck with an implement called a 'charcoal sticks.' *Nhamo* stabbed him with a knife on the leg whilst the deceased was choking him. Accused 2 cried out for help. The assailants must have known that accused 2's distress call would attract his escaped colleague. It worked. Accused 1 turned back to assist his beleaguered companion. He must have expected trouble but certainly did not know that he was walking straight into a lions' den. He was under attack the moment he stepped into the open to check where accused 2 had been stabbed. He was attacked from back and front. From his own narration, there came a time when he had nowhere to go. *Nhamo* was coming from his back. The deceased attacked from the front. There was a fence on one side and trees on the other. Escaping was therefore out the question. His choices were limited to either being killed or confronting his attackers head on. At the time he hit the deceased with the metal bar on the head, the deceased had just brandished the axe which had been thrown to him by *Nhamo*. He had lifted it, poised to crush the lights out of accused 1. Accused 1's testimony put the court into the complete picture of what was happening. The scene resembled a war zone. Anyone who blinked risked death. In such circumstances, there was no opportunity for the accused to do anything else other than attack his assailant. Accused 2 was in a worse situation. The knife stab on his leg had completely immobilised him. He was helpless. It was not possible for the accused to assess the gravity of whatever actions they

chose in the heat of the fight. We conclude therefore that attacking the deceased was necessary and as illustrated above escaping was not imaginable. In any case, the accused's earlier attempt to escape was the reason why they found themselves at the mercy of their assailants.

c. The means used to avert the attack must have been reasonable in the circumstances

Accused 1 attacked the deceased with an iron bar. The bar was 66 cm long and weighed 1.350 kilograms. The measurements make it look lethal indeed. But that cannot be taken in isolation. The requirement entails weighing the means used against the prevailing circumstances. The assailants were armed with even more lethal weapons. *Nhamo* and the deceased had an *okapi* knife and an axe between them. That they were ready to use those weapons against the accused could not be taken for granted. Accused 2 had already been stabbed. There were all the signs that it could be Armageddon for the two accused. It would be illogical and remiss of the court to adopt an armchair approach in this assessment. What is clear is that accused 1 picked up the bar in a bid to fend off and pre-empt the axe strike from the deceased. That he ended up killing the deceased was most unfortunate but it cannot be imagined that the bar was a defensive means which was worse than the knife and the axe. It was necessary to avert the attack.

d. harm caused on the attacker and not on innocent third parties and harm not grossly disproportionate to that which could have been caused by the unlawful attack

The fight did not injure any third parties. It remained confined to the four of them. The accused's attack was targeted at and caught their assailants only. The first part of the requirement is therefore met effortlessly. What needs analysis is whether the harm caused was not grossly disproportionate to that which could have been caused by the unlawful attack. In our view, that again is a no brainer. The belligerent deceased and his murderous father were not saints. They meant mortal harm to the accused. As already said it was defend yourself by any means available or get killed for the accused. It would again have been foolhardy for the accused to wait and measure the amount of harm inflicted on themselves to be able to assess the level of injury that they could also throw at their adversaries. We will keep emphasising that it is

regrettable that a life was lost but there appeared to have been no reprieve for life on this day. Either way chances are high that a life would have been lost. It was only a question of whose life. As such the harm that would have been caused to the accused was likely to be death. Against that background we find that the harm caused if looked at in the circumstances of what was unfolding on the ground was not disproportionate to that which could have been caused by the unlawful attack.

Disposition

Against the above background accused 1 cannot be said to have had the intention to cause the deceased's death. He discharged the *onus* on him to lay the basis of his defence of self-defence. The state was required to disprove it. As illustrated, the accused ticked all the boxes in relation to the requirements for the defence of defence of person. It follows therefore that the state was not successful in proving the guilt of the accused beyond reasonable doubt as required by law. Accused 1 is therefore found not guilty and is acquitted of the charge of murder.

The National Prosecuting Authority, state's legal practitioners
Advocate Chambers, first accused's legal practitioners
Mutumbwa, Mugabe & Partners, second accused's legal practitioners

