STATE
versus
BIGKNOWS WAIROSI

HIGH COURT OF ZIMBABWE
UCHENA J
SITTING with Assessors Messrs E N BARWE, and C T GONZO
HARARE, 14, 15 January, 30 March, 3, 4 May 2010 and 4 February 2011

Criminal Trial

M Mbanje, for the State
M Nkomo, for the accused

UCHENA J: The accused was charged with the murder of his own son in contravention of s 47 (1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. He pleaded not guilty.

It is common cause that on 12 June 2007 the accused left his parents' home in Chivakanenyama village Karoi. He left in the company of his two sons Ronald and Tawanda. He had told his mother Eneresi Siamkonde that he was taking his sons to the Registrar General's office in Karoi to obtain birth certificates for them. He ended up boarding a lift to Ceresi farm. His son Ronald was found dead in the bushy paddock of Sandara farm. His head had two wounds, and his right ear lob had been cut off. The accused's younger son Tawanda was found wondering in the same bushy paddock at Sandara farm.

The State alleged that the accused took his sons from his mother, who was staying with them, on the pretext that he was going to obtain birth certificates for them. He then boarded a motor vehicle driven by one of his three accomplices. He had arranged with them, the murder of his son Ronald. His accomplices were dressed in black attire. After travelling for a long distance the motor vehicle was stopped by the road side in a bushy area. Two of the man dressed in black ordered Tawanda to disembark from the motor vehicle. They asked the accused to also disembark from the vehicle. One of the men dressed in black remained in the vehicle holding the deceased's hand. The driver handed an iron bar to the accused, who struck the deceased with it twice on the head. The deceased collapsed. On seeing this Tawanda escaped and disappeared into the bush. The accused then cut the deceased's right ear with a scissors, and drained blood oozing from the deceased's head into a lunch box. The accused and

his accomplices then dumped the deceased's body in the grazing area of Sandara farm. The accused then crushed the deceased's head with a stone.

At about 1800 hours of the same day Munyaradzi Kondo, found Tawanda wondering in Sandara farm. He took him to his house where he bathed, fed and accommodated him. The next day he took Tawanda to his employer with whom he took him to Karoi Police Station.

In his defence outline the accused said he intended to take his children to Ceresi farm where he had secured employment. He boarded a blue pick up truck at Madiro Supermarket. The driver of the truck was in the company of two other man who were seated at the back of the truck. The truck was driven along Nyamapidze road which passes through Ceresi farm. When the motor vehicle got to Murereshi river one of the men at the back of the truck pulled out a gun and ordered Tawanda to disembark. The accused also attempted to disembark, but was ordered to remain seated. He was threatened with death if he moved or made any noise. The other man firmly held Ronald. The motor vehicle moved for about 200 metres and stopped again. The driver of the motor vehicle (Everson Major disembarked with an iron bar which he handed over to Mazheke. Mazheke struck Ronald twice on the head with the iron bar, and he collapsed to the floor of the truck. While Mazheke was striking Ronald with the iron bar Masunda was pointing a gun at the accused. Mazheke covered Ronald's body with a blanket. The motor vehicle was then driven along Sandara road. The motor vehicle stopped at Renlock farm, where Masunda ordered the accused to disembark, threatening him with death if he made any noise.

The accused went to Ceresi farm where he narrated the ordeal to his sister Lillian Wairosi, and her husband. Early in the morning of 13 June 2007 the accused went to Karoi Police to report the incident. He arrived at Karoi Police Station at 0700 hours, and made a report to Nyamadzawo who was the officer on duty. He thereafter went back to Ceresi farm. On 14 June 2007, he went back to Karoi Police Station, where he was advised that Tawanda had been found. He took Tawanda to his mother in Chivakanenyama Village, and reported the incident to her.

On his way back from Chivakanenyama to Karoi the accused passed through Magunje Police Station where he was advised that his other son had been found dead at Sandara Farm. The deceased's body was brought to Magunje Police, after which the accused and his maternal uncle, and the deceased's body were taken to Karoi.

The accused was put in cells, at Karoi Police Station, where he was thereafter interrogated. He alleges that Police Officers beat, him on the soles of his feet and on the back with wooden planks. He alleged that they also denied him food, as they were forcing him to confess that he had participated in the deceased's murder. He initially refused to make the confession. The torture and starvation continued for three days without an end in sight, leading to his making the statement in the confirmed warned and cautioned statement.

He was thereafter taken to the scene of the murder, where he was tied to a tree trunk and assaulted with sticks for him to confess that he had crushed his son's head with a stone. He was later locked up and taken to court on 28 June 2007, together with the other three suspects, who had by then been arrested by the Police.

The accused therefore denies causing Ronald's death, nor in any way, participating in causing it.

The State led evidence through admissions in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*] herein after called the CP&E Act, the production of exhibits and *viva voce* evidence.

Admissions

The evidence of Munyaradzi Kondo, Japhet Mauzeni, Inspector Chaguta, Annah Muringayi and Dr J Mangunda was admitted by the accused's legal practitioner, in terms of s 314 (1) of the CP&E Act. Section 314 provides as follows:

> "(1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact."

The evidence of these wittiness's is therefore not in dispute and calls for no further assessment. It is accepted as it appears in the State's summary of evidence.

Munyaradzi Kondo's evidence establishes that, he towards sunset on 12 June 2007, found the then 7 year old Tawanda wondering alone in the bush of Sandara farm. He took him to his house where he bathed, fed and accommodated him for the night. The following day he took him to his employer with whom he took Tawanda to Karoi Police Station.

Japhet Mauzeni is employed at Sandara farm. He on 16 June 2007 found Ronald's dead body in the farm's grazing area. The deceased's body was close to an ant-hill. It was partially

clothed. The deceased's male organs were exposed. The deceased's short trousers, was lowered to knee level. He on 17 June 2007, reported what he had seen to Karoi Police Station.

Inspector Chaguta received Mauzeni's report, and led a team of Police officers to the scene of crime. He went with Sgt Mugauri, Detective Sgt Nhari, and Detective Cst Katsvere. They were led to the scene by Mauzeni. He observed that the deceased's body was at an advanced stage of decomposition. He observed that the right ear had been cut off and the deceased's clothes were blood stained. The deceased's short trousers, was lowered to knee level. They took the deceased's body to Karoi Hospital mortuary. He said no further injuries were caused to the deceased's body while it was being transported to Karoi Hospital mortuary.

Anna Muringayi is Karoi Police's Victim Friendly Unit's Coordinator. She on 26 June 2007 recorded a statement from Tawanda Wairosi. She observed he had difficulties in identifying colours, but was able to identify a motor vehicle which was involved in this case.

Dr Mangunda is a holder of an MBchB degree, and is the doctor who performed an autopsy, on the deceased's body. He observed a fractured parietal bone measuring 3 centimeters, a fractured temporal bone measuring 4 centimeters, and a partially amputed right ear. He concluded that the deceased died of head injuries. The fractured parietal and temporal bones confirm that two blows were delivered to the deceased's head.

The admitted evidence of Kondo and Mauzeni establishes that Ronald was killed at or near Sandara farm. His body was found there, and Tawanda his young brother with whom he and the accused were traveling was also found wondering in the bush at Sandara farm. This proves the accused, deceased and Tawanda parted ways, at Sandara farm.

Inspector Chaguta and Dr Mangunda's evidence establishes that the deceased died a violent death. They both observed injuries on his head and a cut right ear. Inspector Chaguta observed that the deceased's short trousers had been lowered to knee level. The cutting of the ear and lowering of the trousers suggests a ritual murder.

The evidence of Anna Muringayi establishes that Tawanda is a vulnerable wittiness. It guides the court as to how his evidence should be adduced.

Exhibits

The following exhibits were produced by consent, the postmortem report as exh 1, photographs taken during the postmortem examination as exh 2 (a) to (h), the stone recovered

near the deceased's body as exh 3, a report on the weight of the stone as exh 4, and the accused's warned and cautioned statement as exh 5.

Exhibit 1 confirms that the deceased died of head injuries. It specifies were the injuries were inflicted. It confirms that the deceased's right ear was partially amputed. It confirms the evidence of Sgts Nhari and Katsvere, on their observations of the deceased's injuries.

Exhibits 2 (a) to (h) confirms the undisputed findings of Dr Mangunda, and Sgts Nhari and Katsvere's observations on the deceased's injuries.

Exhibit 3 the stone was produced but its evidential value was challenged by the accused's counsel. Sgts Nhari and Katsvere said they found it near the deceased's body, and had a patch of human hair on it. When it was produced in court the patch of hair was no longer on it. Sgts Nhari and Katsvere who testified *viva voce* said it must have fallen from the stone due to the lapse of time. This issue will be considered in detail under disputed evidence.

Exhibit 4 the report on the weight of the stone was produced by consent. It establishes that the stone weighed 7.18kgs. The stone's weight reveals its potential to cause serious injuries on a human head, especially that of a nine year old child.

Exhibit 5 the accused's confirmed warned and cautioned statement was produced by the State in terms of s 256 (2) of the Criminal Procedure and Evidence Act. It was however challenged by the accused who alleged that he was tortured and starved by the Police who were forcing him to admit the offence in the manner narrated in that statement. It will be dealt with in detail when I consider disputed evidence.

***Viva Voce* Evidence**

The State called *viva voce* evidence from, Eneresi Siamkonde, Tawanda Wairosi Sgt Nhari and Sgt Katsvere.

Eneresi Siamkonde is the accused's mother. She told the court that on 11 June 2007, the accused came to take the deceased and Tawanda to Karoi to obtain birth certificates for them. She dissuaded him from taking the children because a mobile Birth Registration unit was to soon visit their area for purposes of issuing birth certificates. She further pointed out to him that he could not obtain birth certificates for the children in the absence of their mother whom he had divorced. Despite her objections, the accused on 12 June 2007 took away the deceased and Tawanda. He came back with Tawanda on 14 June 2007, and told her that he and

the children had boarded a motor vehicle intending to go to Ceresi farm, but were attacked by the driver and his two accomplices. He fought them, and in the process threw Tawanda from the motor vehicle. He eventually ran away from the motor vehicle leaving Ronald ("the deceased") in the motor vehicle. He told her that when they boarded the motor vehicle there were many other passengers in the motor vehicle.

Eneresi gave her evidence convincingly. She said though the accused is her son she had to tell the court what she knew. There is no known bad blood between the accused and his mother. There is nothing in her evidence to suggest a motive to lie. The accused in his evidence does not dispute that she strenuously resisted his taking the children away. He admitted that she questioned him about how he could obtain the birth certificates without the children's mother. He admitted that she told him not to disturb the children's education as he was taking them away without seeking permission from the school authorities. We are satisfied that she told the truth.

Tawanda Wairosi is the accused's son. He was 7 years old when he and Ronald his 9 year old deceased elder brother were taken from Chivakanenyama village where they were staying with Eneresi their paternal grandmother. He was 9 years old when he testified in March 2010. He testified through closed circuit television in a victim friendly court at Harare Magistrate's court. The accused's trial had started at the High court, in Harare, but had to be adjourned, to await the gazetting, of the court's sitting at Harare Magistrate's court for purposes of adducing Tawanda's evidence in a victim friendly court.

The need to use victim friendly court facilities arouse when counsel for the State and the accused advised the court that Tawanda was a vulnerable witness, who had collapsed at the entrance of the High court on seeing his father's relatives. It became apparent that measures to protect a vulnerable witiness as provided in s 319B of the Criminal Procedure and Evidence Act had to be invoked. Section 319B provides as follows:

> "If it appears to a court in any criminal proceedings that a person who is giving or will give evidence in the proceedings is likely—
> (*a*) to suffer substantial emotional stress from giving evidence or
> (*b*) to be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully; the court may, subject to this Part, do any one or more of the following, either *mero motu* or on the application of a party to the proceedings—

(i) appoint an intermediary for the person;
(ii) appoint a support person for the person;
(iii) direct that the person shall give evidence in a position or place, whether in or out of the accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated:
Provided that, where the person is to give evidence out of the accused's presence, the court shall ensure that the accused and his legal representative are able to see and hear the person giving evidence, whether through a screen or by means of closed-circuit television or by some other appropriate means;
(iv) adjourn the proceedings to some other place, where the court considers the person will be less likely to be subjected to stress or intimidation;
(v) subject to s 18 of the Constitution, make an order in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Cap 7*:*04*] excluding all persons or any class of persons from the proceedings while the person is giving evidence."

It was obvious that Tawanda was already showing signs of being stressed by the environment and intimidated by the prospect of facing his father and persons connected to him in open court. I had no hesitation in directing that, the case be adjourned, while we waited, for the invocation of procedures which would enable the court to use Victim Friendly Court facilities at Harare Magistrate's court.

The factors to be considered in protecting a vulnerable witness as provided in s 319C (1) (a) to (c) and (e) to (f) are present in this case. Tawanda was 7 years old when the offence was committed. He is now 9 years old. He was to testify against his father, who he says he saw crushing Ronald's head with a stone. The nature of the proceedings, call for the careful adduction of evidence from this witness of tender age. The parties had already sought an order that Tawanda's evidence be adduced in the Victim Friendly Court. The interests of justice, called for the use of such facilities.

The feasibility of our sitting in a Victim Friendly Court was however a challenge as this court does not have such facilities. We adjourned the proceedings, to await the gazetting of Harare Magistrate's court as a sitting place for the High court for this case to enable us to use its Victim Friendly Court facilities. We only sat at Harare Magistrate's court, for purposes of hearing Tawanda's evidence. If the High court had such facilities this would not have been necessary. I recommend that Victim Friendly facilities be installed at the High court. They are necessary as vulnerable witness's testify in this court, under circumstances, which affect their testimonies or leave them traumatized. The gazetting of Harare Magistrate's court on a case to

case basis causes delays in the finalization of cases, as the case, has to be adjourned, until the gazetting takes place.

When the gazetting had taken place, we sat in the Victim friendly Court at Harare Magistrate's court. An intermediary who is a trained court interpreter was appointed to be with Tawanda in the separate room from which he was to testify. We could only see them on closed circuit television. They could not see us. Tawanda had toys to play with. The intermediary was gentle with him. She allowed him to play with the toys as he testified. She in terms of s 319 G removed the sting from the questions put to him, but, conveyed to him their substance and effect. She as required by s 319G repeated to the court the witness' precise words. She performed her duties well to the satisfaction of the court, and counsels for the State and the defence.

Tawanda is the State's key witness. He is the only eye witness to Ronald's murder. He traveled with the accused and deceased from their village in Chivakanenyama to the scene of the deceased's murder. He told the court of how their father the accused took them from their grandmother on the pretext that he wanted to obtain birth certificates for them. He told the court that from Karoi they boarded a motor vehicle in which was the driver and two other men. They traveled for a long distance. The motor vehicle stopped at a bushy area. He initially said his father, and the other men left him by the motor vehicle, when they took the deceased to the bush where his father crushed Ronald's head with a stone. He however said he was close to them. He later firmed his evidence on the version that, he, the accused, and the deceased, walked into the bush where the accused crushed the deceased's head with a stone. When, he saw the deceased being struck with a stone he ran away into the bush. He later met Munyaradzi Kondo in the bush. Munyaradzi took him to his house where he feed him and accommodated him. The next day Munyaradzi took him to Karoi police station. He eventually met the accused his father at the Police station. His father thereafter took him back to his grandmother in Chivakanenyama village. He did not report to his grandmother that his father had murdered Ronald. He was later called by the police whom he says, he told what he told this court.

Towards the end of his examination in chief he said the motor vehicle traveled for a long time and that is when he was left by the motor vehicle. He thus told a single story up to the time they got to the vicinity of the scene of murder. From there on his story seemed to have

developed into two versions. The first was he was left by the motor vehicle when the deceased was walked into the bush by his father and his accomplices. The second was he, his father and the deceased walked into the bushy area where his father crushed the deceased's head. An examination of his evidence reveals that he was emphatic about walking into the bush with his father and the deceased.

These versions emerged when the prosecutor had the following exchange with Tawanda:

Q Where were you when your father attacked your brother?
A **They left me by the motor vehicle, and I, then ran away**
Q How far did your father take your brother from the motor vehicle?
A I was close to them

The impression created is that he remained by the motor vehicle but the deceased was killed near the motor vehicle, as he remained close to them, and saw his father attacking the deceased. A later exchange with the prosecutor reveals that Tawanda did not remain by the motor vehicle, but walked on foot into the bushy area.

Q When you went to the bushy area where were you seated in the motor vehicle?
A **We walked on foot when we went to the bushy area.**
Q Said were in the motor vehicle with your father and other people?
A **That's correct but after traveling for a long distance we got off the motor vehicle and traveled on foot**
Q What about the motor vehicle
A My grandmother had said we would board a bus but we did not
Q When you got off the motor vehicle did it wait for you or it left?
A Had been promised to board a bus but boarded a motor vehicle. It traveled for a long time. **That is when I was left by the motor vehicle.**

The impression that Tawanda remained by the motor vehicle was therefore created by his two statements about, "their leaving him by the motor vehicle", and his later saying, "that is when I was left by the motor vehicle". His later statement emerged from his apparent confusion about how his grandmother had said they were to travel, and their subsequent traveling by a private motor vehicle. The confusion is apparent, and is consistent with his age. His evidence should at the end of the day be considered in light of corroborative evidence from Munyaradzi, where deceased's body was found, the presence of a stone near deceased's body and the accused's admission that they traveled in such a motor vehicle, and the deceased was killed during that journey.

Tawanda persisted with these versions under cross examination, as demonstrated by the following exchanges between him and defence counsel:

Q Told court that after traveling for a long distance you where told to disembark?
A **Correct**
Q Who ordered you to disembark?
A I do not know the person
Q Who was ordered to disembark?
A **We only disembarked when we had reached the bushy area?**
Q Who we?
A **The three of us**
Q It was only you and your father who disembarked?
A **My brother also disembarked**
Q Recall what you told the Police?
A That's what I told them
Q According to the Police you and your father disembarked and another man remained holding your brother?
A **That is not correct, infact when we were going home they instructed me to say my brother had been killed by some strange men.**
Q Told the court that you were left at the motor vehicle is that correct?
A **When I saw my brother was being killed I ran away**
Q Was he killed in the car at the car or in the bush?
A **In the bush**
Q Apart from you who else was present when your brother was killed?
A I do not know the other people who where present
Q During the killing of your brother were other people present?
A **No**
Q Did you see your father striking your brother?
A **Yes**
Q How far were you from them?
A **Very close to them**

Tawanda therefore admitted that he was told to disembark from the motor vehicle, but, insisted that he walked into the bush with the deceased and his father. The admission that he was ordered to disembark from the motor vehicle supports the accused's claim that at some point in the journey Tawanda was ordered to disembark from the motor vehicle. If this is considered in the context of his having been left by the motor vehicle it has the effect of placing Tawanda away from the scene of murder which Sgt Nhari said was 800 m from the road. The majority of the court however believes he obviously made a mistake or was misunderstood, when he said he was left by the motor vehicle. That statement is infact ambiguous as it can mean the motor vehicle left him, or that he was left positioned near the

motor vehicle. When the court sought to clarify this issue Tawanda said the motor vehicle had left when the deceased was struck with a stone and he ran away.

After re-examination by the prosecutor the court sought clarification from Tawanda, and had the following exchange with him.

Q Do you go to school?
A No I have not started going to school
Q When did you start staying at the children's Home?
A Some time back
Q Before or after your brother was killed.?
A After his death
Q What happened when the motor vehicle stopped?
A **We, alighted, my father took us to a bushy area, that's when he killed my brother**
Q Where was the motor vehicle you had alighted from?
A **It had parked by the side of the road, when we walked into the bushy area**
Q Where was it when you ran away?
A **It was no longer present**
Q How many were you in the bush?
A **Three of us, myself, my father and my brother**

The above demonstrates that the motor vehicle was parked by the side of the road when he, the deceased and their father walked into the bush. When he ran away the motor vehicle was no longer present. These events occurred when the witness was 7 years old. He says he has not yet attended any school. That is however contradicted by Eneresi Siamkonde his grandmother who said he was in grade 1 while Ronald ("the deceased") was in grade 3. He is now 9 years old. He impressed the majority of the court, as a fairly honest and truthful witness who is simply telling the story as it happened but only as a 9 year old who has been to school for half a year can. His evidence is not perfect. It is embellished on whether or not he remained by the motor vehicle or was left by the motor vehicle. The majority of the court, are of the view that minor contradictions or inconsistencies in the evidence of a child on events verified, by credible evidence from other witness's, should not led to the rejection of the child's evidence. After all, a child should not be expected to testify with the clarity of an adult. A child's evidence must be assessed as that of a child, but the court must ascertain its truthfulness, by comparing it with corroborative evidence, and other evidence led on the incident in question. I agree with them on how a child's evidence must be assessed but do not agree that Tawanda's evidence is sufficiently corroborated on whether or not he walked into the bush with the deceased and the accused, and saw the accused crushing the deceased's head

with a stone. His statement, that he was left by the motor vehicle tend to support the accused's version of what happened before the deceased's murder. It makes his evidence questionable on whether or not he witnessed the deceased's murder. *Hoffman & Zeffertt* 3rd ed on South African Law of Evidence, dealing with the assessment of the evidence of a child at p 456 says:

> "the court is entitled to take into account any other features which show that the child's evidence is unquestionably true, and the defence story false, but it should not ordinarily convict unless there is corroborative evidence which implicates the accused".

In this case I am of the view that the corroborative evidence of Japhet Maunzeni and Munyaradzi does not implicate the accused but merely proves that the deceased and Tawanda must have been together at or near Sandara farm.

Mr Nkomo for the defence argued that the evidence of this witness must be treated with caution, because of his age, as witnesses of this age are suggestible, imaginative and can fantasize events. Tawanda demonstrated that he is not suggestible when he said the Police told him to say his brother was killed by strange people. He said they told him to tell that story when they were taking him home. He told the court that what they suggested is not what happened. The possibility of that being true is strengthened by his refusing to endorse the version appearing in the State's summary of his evidence, and the accused's confirmed warned and cautioned statement which must have been used to inform the State's case. He seems to us a child bent on telling the truth even if it goes against the State case and his father. The Police must have sought to produce a coherent story, but Tawanda refused to purge himself but told a story which incriminates his own father in a manner different from that narrated in the State's summary of his evidence. If he can not take the suggestion of the Police he cannot therefore be giving evidence suggested to him by anyone. His story is not a product of fantasy or imagination. It is corroborated by common cause evidence. Ronald's head had two wounds and died of head injuries. He died in the bush Tawanda says their father walked them into. Tawanda himself was found in that bush. A stone was found near the deceased's body. Recent case law has established that children do not have fantasies about things they do not know. They fantasize on things they encounter on daily basis. Murder must surely be a strange concept in the mind of a seven year old. He cannot conjure up images of a murder and tell a

story which accurately explains the death of his own brother which is generally supported, by witnesses whose evidence was admitted by the defence.

.In *S* v *Musasa* 2002 (1) ZLR 280 (H) @ 285E to 287 HLATSWAYO J dealing with issues similar to those raised by Mr Nkomo.said:

> "Many judgments of this court and the Supreme Court have underlined the fact that it is highly unlikely for very young complainants to make serious allegations without any basis at all. See, for example, the dicta of MUCHECHETERE JA in *S* v *Muchowe* S – 14-99 at p 9 and CHINHENGO J (with the concurrence of GARWE J) in *S* v *Madzomba* 1999 (2) ZLR 214 (H) at 222, where it was said in respect of rape allegations made by a five year old twenty months after the abuse:
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> > 'It is of course, quite possible that a child of so tender an age can make without much thought, generalized and damaging allegations against the only person at the place she is to be removed. That must however be balanced against the consideration why and whether a girl of so tender an age could make so serious an allegation against the appellant and Abias if nothing of the sort had taken place. The fact of the matter is that her hymen was found missing which tended to confirm her evidence that she had been sexually abused.'
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> Furthermore, psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but that their fantasies and play are characterized by their daily experiences. In this regard; J.R Spencer and Rona Flin The Evidence of Children; The Law and the Psychology 2 ed (Blackstone Press Ltd. 1993) at pp 317- 318 made the following observation:
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> > 'There is certainly no psychological research or medical case study material which suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Children's fantasies and play are characterized by their daily experience and personal knowledge, and unusual fantasies are seen by psychiatrists as highly suspicious: The cognitive and imaginative capacities of three-year olds do not enable them to describe anal intercourse and spitting out ejaculate, for instance. Such detailed descriptions from small children in the absence of other factors, should be seen as stemming from the reality of the past abuse rather than from the imagination' Vizard, E Bentovim, A and Tranter, M (1987) Interviewing sexually abused children"

While I agree with the majority that Tawanda did not give evidence suggested to him or out of fantasies, his evidence remains unsatisfactory. I would therefore agree with Mr *Nkomo,* but for different reasons, that his evidence should be treated with caution. He for instance said he has never been to school, when Eneresi his grandmother said he was in grade

one when his father took him away from her. He can in my view similarly be incorrect or untruthful on other aspects of his evidence.

The State's summary on Tawanda's evidence is at variance with Tawanda's evidence. He is there said to have seen the accused's accomplices wearing black clothes, and the accused receiving money from the accomplices. It is there alleged that he heard the driver and the accused conversing about cutting the ear and the head as they pointed at the deceased. The State's outline also alleges that the deceased remained in the truck held by one of the men, while he and his father were ordered to disembark He is alleged to have seen the driver coming out of the motor vehicle holding three knives, and the accused going to the motor vehicle where the deceased was being held. He is alleged to have thereafter witnessed a violent scene at the motor vehicle after which he ran away. The State did not ask Tawanda about these details. The defence did not cross examine him on them, but put it to him that his evidence in court was different to what was recorded in his statement to the Police. Tawanda's statement to the Police was not produced. The court can not determine whether or not he would have confirmed what is alleged in the State's summary of his evidence if he had been asked about them or given an opportunity to comment on them. A witness's credibility, can not be affected by his not mentioning something, if he was not asked about it, or if he has anything else to say relevant to the case. In a trial where a lot is involved as was the case in this case the prosecutor should have taken the witiness through what was alleged in the State's summary which he had not covered in his evidence. The defence too could have cross-examined him on the omitted evidence if it believed that would assist the accused's case. Mr *Nkomo* for the defence merely asked about there being a difference between the witness's evidence and his statement to the Police. I have already commented on Tawanda's response to that and found that he refused to succumb to the Police's suggestions.

The difference, between the State's outline, and a complainant's or witness's evidence during the trial cannot be held against the complainant or the witness, as they do not take part in the preparation of the State's outline. The difference must however be satisfactorily explained as it will be fatal to the State's case if it remains unexplained when the State closes its case. In *S* v *Nicolle* 1991 (1) ZLR 211 @ 214 B-G KORSAH JA commenting on the functions of the State's and defence's outlines, and the effect of the complainant's departure from the State's outline said:

"Commenting on the importance of the part played by the respective outlines of cases in a criminal trial SQUIRES J said in *S* v *Seda* 1980 ZLR 109 (G) at 110H - 111A:

> 'They perform a similar function to the pleadings in a civil trial, and serve not only to identify what may be in issue between the State and the accused, but to advise each of the substance of the matters that are in issue, with the obvious advantages this affords of avoiding delay in completing the trial. In addition, it must always be appreciated that just as any significant and unexplained departure by the accused in his evidence from the outline of the defence which he makes, may be a matter for comment or even adverse conclusions, so does such a consequence affect what is said by the State witnesses.'

While citing the above dictum of SQUIRES J with approval, I hasten to point out that whereas the outline of defence is prepared, from what, the accused person, tells counsel, and is tendered in evidence with his approval, the outline of State case is not prepared on the instructions of the complainant and is certainly not approved by the complainant before it is tendered in evidence, and does not constitute part of the complainant's testimony. I would suggest that the reason for drawing an adverse conclusion when the outline of State case is seriously at variance with the evidence of the prosecution witnesses is that because of the conflict between the two a doubt is raised as to whether the State witnesses are being truthful. Such a conflict may easily be explained by the production of the complainant's statement to the police. But if this is not done, so long as that conflict is unresolved at the end of the hearing, the benefit of the doubt must be accorded to the accused; for it would not be possible to say that the State has proved the case which it undertook from the onset to prove, and has therefore proved its case beyond a reasonable doubt".

In *Ephias Chigova* v *State* 1992 (2) ZLR 206 @ 213 C to F KORSAH JA again commenting on discrepancies between the complainant's evidence and the State's outline said:

"While I agree that the State is bound to prove the ingredients of the offence it alleges, a précis of a case by the State is not to be given equal weight with the outline of defence on behalf of the accused. The reason for this is simple. The complainant has no control over what a policeman may find relevant enough to include in a precis. The précis is not her word and deed. She is not to be taken as having made categorical statements on matters which, though relevant, are not essential to establish the offence alleged. The complainant's credibility is not to be assessed on apparent conflicts between her *viva voce* testimony and a summary of the case prepared by someone else.

The "defence outline", however, is prepared at the behest of the accused and usually read over by, or to, him and then signed by him or on his behalf. A complainant cannot be discredited because of discrepancies between a summary of the State case and her testimony, in the same way as an accused who, having made categorical statements in his "defence outline", testifies to something other than that which he has put his hand to or stated in his outline of defence, which may tend to underscore the veracity or otherwise of the accused. To discredit a complainant because of discrepancies between

> the State outline and her testimony, the divergence between the two, must be so gross as to be utterly irreconcilable, or her testimony patently false."

The weight to be attached to Tawanda's evidence, must in my view, in view of the irreconcilable variance between his evidence in court and what the State outline said he was going to tell the court be carefully considered. `

In terms of s 319H of the Criminal Procedure & Evidence Act, the effect of the appointment of an intermediary for a vulnerable witness must be considered. Tawanda was treated as a vulnerable witness. He gave evidence through closed circuit television. Could that have had the effect of causing him to depart from what he had previously told the police? An examination of s 319H is called for to ascertain the Legislature's intention on the weight to be given to evidence of a vulnerable witness. Section 319H provides as follows:

> "When determining what weight, if any, should be given to the evidence of a vulnerable witness for whom an intermediary or a support person has been appointed, the court shall pay due regard to the effect of the appointment on the witness's evidence and on any cross-examination of the witness."

The apparent intention is to guard against the effect the appointment of an intermediary or support person will have on the witness's evidence in the sense that, in the case of the appointment of an intermediary the questions are put in the manner deemed appropriate by the intermediary. The taking out of the sting from the questions may bring out answers not consistent with the question asked. If that happens, the prosecutor or defence counsel would point that out, or ask the question in a different manner. That did not happen in this case. Counsel for the State and the defence did not question the professionalism of the intermediary. She therefore did not adversely affect Tawanda's evidence.

Section 319H is also meant to assess the effect of the appointment of an intermediary or support person, on the mind of the vulnerable witness and the resultant effect of that mind frame on the vulnerable witness's evidence. This is so because the appointment of a support person does not in terms of s 319H (3) include the receiving and answering of questions through the support person, but merely the rendering of moral support. This means the effect of the appointment should also be that which the appointment will have on the mind and subsequent conduct of the vulnerable witness. In the case of the appointment of an intermediary, and the use of a separate room, the witness could due to the relaxed atmosphere from which, he will be testifying loose the effect of the oath or admonition to tell the truth, and

drift away into the world of play, loosing the need to tell the truth. In our view Tawanda did not because of the comfort of the separate room drift away from the need to tell the truth. He gave answers to the questions which were put to him. He did so to the best of his ability regard being had to his age and lack of education. He, did not drift away from the need to tell the truth. His evidence was generally corroborated by Munyaradzi's evidence, and the place where the deceased's body was found.

The variance between the State's outline and Tawanda's evidence, can not be blamed on his testifying through an intermediary from a separate room. The explanation should have come from other State witnesses. Tawanda's explanation for the variance is in my view not enough to dispel the doubt created by the wide gape between his testimony in court and what the State in its summary of his evidence said he was going to tell the court.

In my view the major part of the variance remained unexplained at the end of the State case. This in my view leaves a reasonable doubt in the State's case which if not resolved through other evidence must be resolved in the accused's favour. The doubt is strengthened, by Tawanda's prevarications on whether or not he was left by the motor vehicle when the deceased was taken into the bush where he was murdered. This determines whether or not he witnessed the murder. Sgt Nhari said the deceased's body and the stone alleged to have been used where found 800m from the road. If the deceased was murdered 800m from the road how could Tawanda who in one of his versions said he observed the murder from where he had been left by the motor vehicle, parked by the side of the road, have witnessed what happened far away from where he had been left.

The Assessors are however satisfied that Tawanda's refusal to go along with the police's suggestion that the deceased was murdered by strange people, is sufficient to explain the variance between the State's outline and his evidence. They are of the view that as explained by Tawanda the difference is because the police wanted him to tell a story as per the State's outline. In my view the police should have been called to testify on the variances. The variance been the State's outline and Tawanda's evidence is too wide to be satisfactorily explained through the alleged suggestion by the police. It is in my view not safe to rely on Tawanda's explanation for the variance. At the very least Tawanda's statement should have been produced for the court to test the reliability of his explanation of the variance. However as this is a decision based on the assessment of evidence and therefore a factual issue the

assessors' view must in terms of s 10 (2) of the High Court Act [*Cap 7:06*], prevail. Section 10 (2) of the High Court Act provides that the decision of the majority shall prevail on any question of fact arising at a criminal trial in the High Court.

Sgt Elias Katsvere testified for the State. He told the court that they on 18 June 2007 received a report of a dead body having been seen in the paddock of Sandara farm. He proceeded to Sandara farm in the company of other police officers. They were led to the scene by Japhet Mauzeni who had discovered the deceased's body. He observed that the deceased's body was partially undressed with his short trousers lowered to knee level. He noticed a stone with a patch of human hair near the deceased's body. He noticed that the deceased's ear was missing. They put the deceased's body in a police coffin, and took the stone. They conducted other investigations and proceeded to Magunje Police Station, where they met the accused leaving Magunje police and going to Karoi. They arrested the accused and took him and the deceased's body to Karoi Police Station where the accused was put in police cells.

The next day they took the accused to Karoi CID offices where they interviewed him in an office used by 22 officers. Officers were coming in and going out during the recording of the statement. They interviewed him at the southern corner of that office. He said the accused made the statement freely and voluntarily without being unduly influenced thereto. He said the accused person was not assaulted by the police during the interviews and the recording of the warned and cautioned statement. Sgt Nhari record the statement and he witnessed its recording. He does not recall when the statement was recorded.

Sgt Katsere identified the stone which he said they saw at the scene. It was produced as exh 3 by consent. The document on which the weight of the stone was recorded by Fredy Kawanza of Karoi Zim Post was produced through him as exh 4 by consent. It records that the stone weighed 7.18Kgs.

He, under cross-examination said he saw one injury on the deceased's head, and a stone near the deceased's body. He said the stone had a patch of human hair, which he suspected was the deceased's as the injured part had no hair. He told the court that he did not manage to have the hair scientifically matched to the deceased because the Forensic Science Laboratory did not then have the required chemicals for the examination. When questioned about the absence of the hair from exh 3 he said it could have fallen from the stone due to the

lapse of time. He said they could not uplift finger prints from the stone because it has rough surfaces and fingerprints can only be uplifted from smooth surfaces.

On the recording of the accused's warned and cautioned statement he said Sgt Nhari recorded the accused's statement after they had interviewed the accused for four hours. They had interviewed him and stopped to await instructions from their seniors. There were four officers in the investigating team. They all took turns to interview the accused person. They interviewed him in the big office and in the Officer-In-Charge crime's office. Other officers who use the big office would come to where the accused was being interviewed, but only after they had finished interviewing him. He said the warned and cautioned statement was not recorded on the same day because Everson Major, Takaedza Masunda and Samuel Mazheke whom the accused person had mentioned as his accomplices had to be picked. They subsequently arrested the accomplices. When asked where the accomplices are he said Samuel Mazheke had died, but Takaedza is in Karoi and Everson in Magunje. He does not know why the accomplices where not prosecuted. The accused's statement was recorded on 20 June 2007. He denied the accused's allegation, that he was assaulted in the I/C Crime's office. He said the accused was cooperating and they were writing what he was saying. When asked whether the accused had had breakfast when they took him for interviewing, he at first said he did not know but later changed and said his relatives were bringing him food.

Under re-examination he said they did not continuously interrogate him for four hours, but had left him alone when the accused called him and said he now wanted to tell the truth.

Sgt Katsvere's evidence on the deceased's injuries, where the deceased was found and the state of his clothing is corroborated by other witnesses whose evidence was admitted in terms of s 314 of the CP&E Act. It is therefore accepted. His evidence on their finding a stone at the scene of the murder is supported by the production of exhibits three, and four by consent. There is no doubt in our minds that a stone was found at the scene. What has to be determined is whether or not there was human hair on the stone, as alleged by this witness and Sgt Nhari.

His evidence on the recording of the accused's confirmed warned and cautioned statement is embellished by the contradictions between him and Sgt Nhari on the following: That the accused was interviewed in the big office and the I/C crimes office when Sgt Nhari said he was only interviewed in the big office. He also said other officers were coming in and

going out during the interview, while Sgt Nhari at first said they were not. He also said other officers not involved in the investigation would come and ask the accused questions. On whether or not the accused was being given food during the time he recorded the confirmed warned and cautioned statement he said he does not recall, but there-after said his relatives were bringing him food. It seems he was tailoring his evidence to give credit to the recording process. He generally seemed to have given more credible evidence than Sgt Nhari. His evidence also differed with Sgt Nhari's on how the statement was recorded. He said the accused gave his statement while they recorded what he was saying. Sgt Nhari said the accused wrote his own statement on a piece of paper. Sgt Katsvere's evidence agrees with the accused's who says the police recorded the statement. Again Sgt Katsvere's evidence seems more truthful on this aspect than Sgt Nhari's.

The recording of the statement in an office were several other officers could come in and ask the accused questions, takes credibility from the recording process. The possibility of the accused being denied food also takes credit from the recording process. These tend to support the accused's allegations against the recording of his confirmed warned and cautioned statement. The contradiction between the recording officer's evidence on whether the accused wrote his own statement or the police recorded what he said, leaves one officer supporting the accused while the other is being contradicted by his own colleague's evidence. This takes credence from the statement which was accepted in evidence by consent as exh 5. It destroys the statement's evidential value.

Detective Sgt Nhari also testified for the State. His evidence on how they responded to the report of the deceased's body being found in the paddock of Sandara farm, and what they observed at the scene is similar to that of Inspector Chaguta and Sgt Katsvere. He is the investigating officer of this case. He noticed an injury on the deceased's head and that the deceased's ear had been cut. He saw a stone near the deceased's body which had a patch of human hair on it.

They put the deceased's body in a police coffin and proceeded to Magunje where they found the accused at Magunje police station. The accused was on his way to Karoi police station to report that his other child had been found dead at Sandara farm. They took the deceased to Karoi Hospital mortuary, and the accused to Karoi police cells.

Testifying on how he and Sgt Katsvere recorded the confirmed warned and cautioned statement from the accused, he said the next day they took the accused to their offices for interrogation.

They interviewed the accused for four hours, after which he opted to tell Sgt Katsvere the truth. He later warned and cautioned the accused, who wrote his own statement on a piece of paper. The statement was translated into English at Karoi court. He read the typed statement to the accused, who, agreed with it and signed it. He said they took the accused to court within the stipulated 48 hours. He however later said they took him to court after three days on 22 June 2007. He said the accused person was not assaulted as he was cooperating with them.

Under cross-examination he said they found the deceased's body about 800 meters from Chiumburukwe road. He observed two wounds on the deceased's body, including the cut ear. He however does not dispute that the Dr found two wounds on the deceased's head. He said a Dr, does a thorough examination, therefore the Dr's findings should prevail over his observation. He said while they were at Magunje the accused's uncle rushed to them and said he was with the deceased's father.

On the issue of the hair he said he saw on the stone he indicated the part of the stone where he said the hair was. He could not answer when he was asked how the court would know that, that was where the hair was. He also gave no answer when he was asked why the hair was not on the stone, or placed before the court. When the court asked him if he was going to answer the questions he then said the hair was no longer on the stone as the stone and hair were taken to the Forensic Science Laboratory for examination, but the examination did not take place due to the none availability of facilities.

On what happened before and during the interrogation of the accused person he said the accused had been given supper by his uncle. He admitted that 22 officers use the office they used. He initially said no one was allowed to come in during interrogations. When Mr *Nkomo* put it to him that Sgt Katsvere said investigating officers would come in to take dockets he conceded that they were coming in to take their dockets. He disputed Sgt Katsvere's evidence that the accused was interrogated in the big room and in the I/C crime's office. He said the accused was interrogated on 19 June 2007. He confessed his involvement on the same day after four hours. They however did not record the statement on the same day because they had to take it to Karoi for translation by the prosecutor. When it was put to him

that the accused was only taken to court for the confirmation of his statement he said he does not recall. When asked to show the court the accused's hand written statement he perused the docket and told the court he could not find it.

When asked why the accused's alleged accomplices where not in court he said they were facing the same charge but he had been instructed by the I/C crime to proceed with the case in the manner he did. When asked whether they kept the accused at their offices after he had confessed, he said they kept him so that they could record his finger prints. When it was put to him that finger prints are recorded before interviews, he conceded and then said they kept him at the offices because their office is not close to the holding cells. He denied spearheading an assault on the accused to force him to give the confirmed warned and cautioned statement.

On being re-examined by the prosecutor Sgt Nhari said the accused was not present when he took his statement to court for translations. When the prosecutor asked him which version the court should believe as he had earlier said he took the accused to court for the translation of the statement, he said he only took the accused to court for the confirmation of his statement. When asked if he ascertained what had happened to the hair which was on the stone before coming to court he said he did not open the plastic with the stone and hair after it had been retrieved from the exhibit room.

Sgt Nhari's evidence on the recording of the statement can not be relied upon. He is contradicted on material aspects by Sgt Katsvere who witnessed the recording of the statement. Sgt Katsvere said the accused gave an oral statement which they recorded. Nhari on the other hand said the accused wrote his own statement, but could not produce such a statement. He was obviously not telling the truth, because, if the accused had written his own statement Sgt Katsvere would have seen that and testified to that effect. and the written statement could have been found in the docket. He also tried to conceal the truth when he said the interrogation of the accused only took place in the big office, and in the presence of the four interrogating officers. His attempts to mislead the court were exposed by Sgt Katsvere who said other officers would come in and go out during the interrogations, and would also come to the accused and ask him questions. When Nhari was confronted with Katsvere's evidence he admitted that other officers would come in during the interrogations. This confirms that his evidence must be treated with caution as he has shown a propensity towards

misleading the court. Where his evidence, conflicts with that of Sgt Katsvere we will accept Sgt Katsvere's. Sgt Nhari also tried to mislead the court when he said the accused was taken to court within the stipulated 48 hours. He later conceded that he only took him to court for the confirmation of the warned and cautioned statement. According to exh 5 that, was on 28 June 2007, when the accused had been arrested on 18 June 2007.

The delay in taking the accused to court lends credence to the accused's allegation that he was brutally assaulted by the police who were forcing him to admit the charge. He said he was severely assaulted on the soles of his feet so that he could not walk. If the police had taken him to court within the stipulated period the court would have noticed it and *mero moto* inquired as to why he was having difficulties in walking. An explanation by the accused that he had been assaulted would have been readily accepted because of his condition. The police's failure to comply with the law as to when an accused person should be taken to court, when placed against an accused's allegation of assault leading to visible signs of assault, confirms the accused's allegations, and renders the admitted confirmed warned and cautioned statement of no evidential value. It has the effect of helping the accused to discharge his onus on the challenge he will have mounted against the reliability of the confirmed warned and cautioned statement. Sgt Nhari also attempted to mislead the court when he said they kept the accused at their CID offices after he had confessed, because they wanted to take his finger prints. When Mr *Nkomo* put it to him that finger prints are taken before an accused is interviewed he agreed that, that is the correct procedure and changed his story and said they kept the accused at their offices because the police cells are far away from their offices. This, demonstrates that Sgt Nhari's evidence can not be relied upon unless it is corroborated by that of credible witnesses or common cause evidence.

The accused person ("Bigknows Wairosi") testified on his own behalf. He in the main maintained what he had said in his defence outline. He however added the following in his evidence in chief. That he does not know how his son Ronald died, but was told by police that he died on 12 June 2007. That is obviously a lie as he in his evidence later contradicted himself, when he said he saw Mazheke striking the deceased with a metal bar. That when he left home with his children he wanted to obtain birth certificates for them and that he had their health cards. On how they sat at the back of the pick-up truck he said he and Tawanda sat towards the back while Ronald sat further in. One of the two men who were with the driver but

ridding at the back of the truck sat near Ronald and the other who later pointed a fire arm at them, sat on the accused's left. He said after Ronald was struck twice with an iron bar and covered with a blanket the motor vehicle was driven on the road that leads to Rain Lock farm. After some distance the motor vehicle stopped and he was ordered to disembark without causing trouble, as they were leaving. It was now after sunset. He remained seated in the motor vehicle and tears started coming out as he looked at his dead child. He was pushed off the motor vehicle and he fell to the ground, as the motor vehicle drove off. He went to a nearby home where he reported his ordeal. The people of that homestead escorted him to where he had been pushed off the motor vehicle, but later told him to go and report the incident to his employer. He walked to Ceresi farm and reported the incident to his sister, her husband and his employer's children. His employer was not at Home.

The next day he reported the incident to Magunje police station, and returned to Ceresi farm. On 14 June 2007 he went to Karoi police to report the incident. He was advised that one of his children had been brought to Karoi police. He was there reunited with his son Tawanda. He took him to his mother in Chivakanenyama village. He explained the incident to his mother. On 18 June 2007 he went to Magunje to follow up about his other son. He received information that Ronald's body had been found in the bush at Sandara farm, and that a police vehicle had gone to Sandara farm to collect Ronald's body. The police vehicle arrived with the deceased's body. He and his uncle with whom he was traveling got into the motor vehicle and went to Karoi. They left the deceased's body at Karoi Hospital's mortuary. He was then handcuffed and taken to Karoi police cells.

The next day he was taken from police cells and taken to CID offices, where he was questioned about the deceased's death. He said he gave them the explanation he gave in his defence outline, but the police said he was lying. He was hand cuffed and leg ironed, and assaulted on the soles of his feet and his back. He as a result could not walk. The officers told him if he kept on denying he would not be given food which his relatives would bring for him. He was interrogated by about 12 officers, and other officers were coming in and going out. When the officers left for lunch they left him handcuffed, with one of his legs in leg irons, chained to a table. On their return they assaulted him and thereafter took him to police cells at 3.00 pm. He did not have anything to eat before he was locked up. He said among the officers who assaulted him were Malvern Nhari and Elias Katsvere. He said he was tortured and

denied food for four days resulting in his giving the confirmed warned and cautioned statement which was produced by the State as exh 5 in terms of s 256 (2) of the CP&E Act. He said he made the statement on 22 June 2007.

He described the statement, as one the police forced him to tell, as they put words into his mouth. He said Sgt Malvern Nhari supplied the details. He said they forced him to say he struck the deceased with an iron bar, and accept that he knew the three men who were in the truck. He said at that time the three men had been arrested. He said he did not know their names but only knew them by sight. He said he gave in because of assaults and starvation. He added that they assaulted him daily for four days. They would take him from cells and assault him before asking him questions.

On the confirmation of the statement he said he understood what was going on at the time the statement was confirmed. He however later said he did not appreciate the implications of the confirmation of the statement. He denied receiving $40 000 000-00, from the driver, and said Samuel Muzheke is the one who struck Ronald with an iron bar, but denied speaking to Takaedza Masunda or knowing him.

The accused maintained his story under cross examination but added the following. That he was staying near his children's mother and could go and take her to the Registrar General's Karoi office if she was required. He further said he had been given a letter by his employer who is the Member of Parliament for the area through which he could get birth certificates without the children's mother. He admitted that his mother had asked him about the children's mother being required, and said he told her he would get the children's mother if he failed to get the birth certificates through his employer's letter. He said he could not rely on the mobile Unit referred to by his mother, as it visited places after a long time, and he could not rely on it as he was employed away from home. He said his mother could not obtain birth certificates for them in his absence. He on further cross examination said he was afraid to approach his children's mother as she had remarried. He conceded that his mother asked him if he was going to use his current wife to obtain the birth certificates, and he told her he could not as she was too young for presentation as the children's mother. When it was put to him that his mother said he did not answer when she asked him, he said he answered, but his mother did not hear as she was mourning. When he was told that no one had died yet, he merely said he told her he would get the children's mother if the letter from his employer did not assist.

On the number of people who boarded the pick up truck he said he told his mother that besides him and his children there were only the driver and two other men.

On Tawanda's evidence he disputed being seen striking the deceased with a stone and said Tawanda had disembarked a distance away from the place where Ronald was struck on the head with an iron bar by Muzheke. He said he does not know why Tawanda his own son would lie against him, but said the police took him away and could have couched him on what to say. It is true that Tawanda was taken away from, the accused's home and is staying at a Children's Home.

On the recording of the statement he conceded that it was recorded on 20 June 2007, after he had been arrested on 18 June 2007. He said his alleged accomplices were arrested four days after the date of his arrest. He had merely described them to the police as he did not know their names. He said he does not know how the police could have given him their names for inclusion in his statement. He further said when he went to court for the confirmation of the statement the police had threatened to take him back and assault him if he did not cooperate. He later said he had previously been taken to court and had told the court that he was denying the charge and was taken back to CID offices.

The accused person's challenge to the confirmed warned and cautioned statement must succeed for the reasons already given under the assessment of the State's evidence, even though his own evidence on how he recorded it, is not convincing on some aspects. I will therefore not revisit that aspect. I will now proceed to analyse his evidence against that of Siamkonde his mother, Tawanda, Sgts Katsvere and Nhari and the other witnesses whose evidence was admitted in terms of s 314 of the CP&E Act.

We are satisfied that the accused took his children from his mother against her protestations. He did so in circumstances which raised suspicion as to why he was taking them in circumstances which clearly show that he was not likely to obtain birth certificates for them in the absence of their mother. In deed he did not obtain the birth certificates for the reason his mother had warned him about. That however does not prove intent to murder but merely raises questions as to why he was adamant in taking away the children who were supposed to be going to school. We are also satisfied that he told his mother that he was attacked by people whose motor vehicle he had boarded resulting in his fighting them and throwing Tawanda out of the motor vehicle, and jumping out of it, leaving Ronald in the motor vehicle, which drove

away with him. The accused's version in court is different from the one he gave to his mother. His mother gave her evidence well. There is no reason why she would lie against her own son. This shows the accused was not being truthful about what had happened. His changing from the version he gave to his mother proves that he realised the weakness of that version as it is contradicted by Tawanda's evidence. He then tried to remove Tawanda from the scene, by saying he had been ordered to disembark when the deceased was struck by Mazheke. If Tawanda had not prevaricated on whether or not he was left by the motor vehicle, we could have easily dismissed the accused's version of events as a lie.

Tawanda said the deceased was not struck with an iron bar as alleged by the accused, but was struck by a stone on the head by the accused after the accused had walked him and the deceased into the bush. That leaves the accused's word against Tawanda's. The evidence tilts towards Tawanda's version if the places where Tawanda and the deceased's body were found is put into consideration. Munyaradzi said he found Tawanda wondering in the bush of Sandara farm where the deceased's body was also found. The imperfections in Tawanda's evidence, in particular, that he, says he was left by the motor vehicle, swings the scale back to neutral ground. If that means he was left by the motor vehicle before the deceased was attacked as it is capable of meaning then the accused's version gains ground. If it means Tawanda remained at the motor vehicle as the deceased was walked to the place where he was attacked within Tawanda's view, that again swings the scales of justice towards the accused's version., as the deceased's body was found 800m from the road. Tawanda could not have seen the murder which he says occurred in the bushy area, from 800m away

On comparison Tawanda's evidence is more credible than the accused's for the following reasons. The accused lied when he told his mother that there where other passengers in the motor vehicle. He lied to his mother about fighting their alleged assailants. He in his evidence in court gave a different version which does not say he fought their assailants. He in it does not say he threw Tawanda out of the motor vehicle. He does not say he himself jumped out of the motor vehicle and ran away. This plus the general credibility of Tawanda as a witness satisfied the majority. It however did not remove the doubt I entertained on the reliability of his evidence.

It seemed to me that this case would be justly decided if Dr Mangunda and Japhet Maunzeni were to be called as the court's witnesses. Their evidence was admitted in terms of s

314 of the CP&E Act. The court would have wanted to clarify from Mauzeni who led the police to the scene, whether or not there was human hair on the stone exh 3, and from Dr Mangunda whether there was an injury on the deceased's head from which hair had been removed by the object which caused the injury. The Dr could also clarify whether the head injuries he saw were caused by a stone or a metal bar. This was necessitated by the need to arrive at a just decision, as provided by s 232 (b) of the CP&E Act. In my view accepting Tawanda's evidence without further corroboration as the majority of the court did may lead to an unjust decision if the doctor who conducted the postmortem did not see an injury from which hair had been removed, or if the injuries he saw are not consistent with the deceased's head being crushed with a stone. Justice may also not be done if the Dr's examination proves that the injuries were caused by a metal bar, which would corroborate the accused's version. On the other hand justice may also not be done if the accused is given the benefit of the doubt in circumstances were the grey area may be clarified by the Dr and Maunzeni confirming that indeed the deceased's head was crushed with a stone. Section 232 (b) was intended to clarify situations where the available evidence if relied upon without subpoenaing or recalling the witness whose evidence is essential for the court to arrive at a just decision, would lead to an unjust result. The section should be resorted to in circumstances were the available evidence leaves a grey area which can be easily clarified by the calling of the person whose evidence appears essential to the just decision of the case.

Section 232 (b) provides as follows:

> "The court
> (a) …
> (*b*) shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."

The section enables the court or a judicial officer in a criminal trial to achieve justice in circumstances where if he plays the role of an umpire justice would not be done. In the case of *Take & Save Trading CC* & *Ors* v *Standard Bank of South Africa Ltd* 2004 (4) SA 1 (SCA) HARMS JA at p 4 said:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not

> only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done".

Dr Mangunda and Maunzeni,s evidence was admitted in terms of s 314, thereby denying the court an opportunity to clarify the points now necessitating their being called by the court.

The court reconvened and agreed to call Dr Mangunda and Japhet Maunzeni. The case was then postponed for the witnesses to be subpoenaed. On the date when the witnesses should have been heard, the prosecutor advised the court that Japhet Maunzeni is now deceased, and Dr Mangunda had left the country in search for greener pastures. Attempts by the State to trace Dr Mangunda have failed.

In view of the above the case had to be resolved without further evidence. The assessors are of the view that there is sufficient evidence to convict the accused of murder with actual intent. They are satisfied by Tawanda's evidence .that the accused crushed Ronald's head with a stone. I am however hesitant to agree with that finding because of the glaring difference between Tawanda's evidence and what the State said in its outline he was going to tell the court. I am also not quiet satisfied by Tawanda's prevarications on whether or not he was left by the motor vehicle. These unsatisfactory aspects of the State's case, raise a reasonable doubt which in my view should be resolved in the accused's favour. In the case of doubt it is better to let a guilty man go free than to convict an innocent man.

In the case of *Simon Manyika* v *State* HH 215-02 at p 7 of the cyclostyled judgment MAKARAU J (as she then was), commenting on the need for the State to prove an accused guilty beyond reasonable doubt said:

> "On the basis of the foregoing, and being guided by the principle that it is better to let a few guilty persons go free than to convict even a single innocent person, I would allow the appeal"…

The doubt I entertain would have been dispelled if Dr Mangunda or Mauzeni had confirmed that the deceased's head had an injury consistent with Sgts Katsvere's and Nhari's evidence, that he found a patch of hair on the stone, which he believed got to the stone when it was used to crush the deceased's head.

However in terms of s 10 (2) of the High court Act "any question of fact arising at a criminal trial in the High court shall be decided by the majority of the members of the court".

In this case the assessors are of the view that there is sufficient evidence, to prove the accused guilty of murder with actual intent.

.In the result the decision of the assessors must prevail, as this is a finding of fact, which must be determined by the majority.

The accused is therefore found guilty of murder with actual intend.

Donsa-Nkomo & Mutengi legal practitioners, accused's legal practitioners