

THE STATE

Versus

RUSSELL WAYNE LABUSCHAGNE

And

WALTER RYAN CLAASEN

HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO, 9-12, 23 and 25 July, 20 and 22 August, 1-3 October 2002,
and 3 April 2003

Mr *H.S.M. Ushewokunze III*, for the State

Mr *J. James*, for the defendant

Criminal Trial

KAMOCHA J: The two accused who are aged 40 years and 25 years respectively pleaded not guilty to a charge of murder. It being alleged that on 28 November 2000 at Sinamwenda River, Binga both did wrongfully, unlawfully and intentionally kill Wilson Mudimba a male adult in his life-time therebeing.

The State and defence outlines were read and produced as exhibit one and two respectively. The confirmed extra curial statement by accused one was produced as exhibit 3 and that of the second accused as exhibit 4. Exhibit 5(a) was a document containing indications made by both accused on 9 January 2001 and 5(b) were photographs. Exhibit 6 were indications made by Siansole Muchimba. The map of the Sinamwenda area was Exhibit 7.

The State called six witnesses to give *viva voce* evidence. The first witness was Siansole Muchimba "Muchimba" who is a resident of Sinamwenda Village in Binga. He is a fisherman at Chibiya Fishing Camp and has been in that business for at least 8 years. He knows the first accused as a fishing camp operator in that area and had been in the area for about 3 months. The second accused is known to him in connection with this case only. He knew Mr Wilson.

Mudimba - "Mudimba" who was a local man in the Sinamwenda area of Binga. Mudimba in fact used to go out fishing with the witness and had been in the fishing business for at least 4 years. Both used to earn their living by fishing on the upper limits of Lake Kariba and on the tributaries of the Zambezi River.

On 28 November 2000 the witness and his fishing partner Mr Wilson Mudimba who, for ease of reference, shall be referred to as the "deceased" set out in a metal canoe to go fishing along one of the Zambezi River's tributaries known as the Sinamwenda River at about 5 pm. While they were on the river they cast their nets.

Shortly after they had set their nets and were about 30 to 40 metres from the river bank the two accused approached them from the direction of their fishing camp in a speed boat driven by the first accused. Before they got to where the witness and his colleague were the first accused called out to them asking them what they were doing and if they did not know that what they were doing was prohibited. Thereafter the first accused increased the speed of his speedboat heading for the canoe in which the witness was with the deceased. He went for the canoe at right angle. He hit it on one of the sides at that angle. That was the side on which the deceased was. The canoe capsized. The deceased clung to the front section of the speedboat after the impact but the witness was thrown into the water. He, however, swam towards the speedboat and also clung onto it on one side. Their canoe started to float away.

All the four people were now at the speedboat where a struggle ensued. Both accused went for the witness and took hold of him each on either side and pulled him into the speedboat. He put up a struggle resulting in the three of them falling into the water. The two accused let go of the witness and returned into their boat.

After returning to their boat both accused went to the deceased who still clung to their boat. The oar that he was using to paddle the canoe fell into the speedboat when he clung to it. The second accused took hold of the deceased's hand while accused one struck him with the oar. The

beating continued as the boat floated. One of the blows with the oar missed the deceased and landed on a section of the boat and the oar broke into two pieces. As the assault went on, their boat kept on floating towards a dry tree stump protruding in the water. When the oar broke accused two let go of the deceased who then went and clung to the tree stump.

After the deceased had clung to the dry tree stump, the two accused went towards the witness who was at that time swimming, using back stroke, towards the river bank which was about 30 to 40 metres. On seeing that they were going for him, the witness then went under water and continued swimming to the shore. He emerged as he got to shallow water. He then started wading through the water when it was between waist and chest level and finally got to the shore. As he emerged from the water he noticed the accused still in their boat, going back to the deceased who still clung to the tree stump. When the accused got to where the deceased was they struck him with the boat as he still clung to the tree stump. Deceased fell into the water. The deceased then allegedly called out to the witness saying:

“Friend, I am dying.”

The witness allegedly said to him:

“Try to swim towards the bank of the river.”

The deceased however failed to swim and started sinking into the water. As he was sinking the accused drove towards him and the witness got the impression that they wanted to get him out of the water but he had unfortunately disappeared into the water.

The witness then shouted at the accused persons saying he was going to report them for killing his friend. On hearing what the witness said the accused drove the speedboat towards him but he ran into the bush and went round to the other side of the river. When he was on the other side of the river he saw their boat parked on the opposite side but the accused were not there. He then ran to make a report.

The first person he saw was the deceased's brother-in-law called Samuel Mwinde. He told Mwinde what had allegedly happened. The two decided to go to a certain white man known as Michael Shaw and ask him to radio the police at Binga. On their way they met a police reservist known as Makore to whom the witness also made a report about what the accused persons had done to his colleague. Makore then joined them to go and report to Michael Shaw. On arrival at Michael Shaw's house the witness made a report to Michael Shaw about the incident at the river. The witness requested Shaw to radio the police so that they could come while there was still a possibility of finding the deceased's body in the water. But Shaw said he would not do that before he spoke to the first accused and suggested that the witness should return the next morning. The witness, Mwinde and Makore then went away.

The next morning the three went back to Shaw and requested him to phone the police. Shaw is alleged to have been reluctant to do so and said he did not want to be a witness.

The three then decided to go to the river and to try and locate the body. On their way to the river they had to go past the first accused's camp as the first accused saw them walk past he then said he did not want to see the witness there but the three continued on their way. When they got to the river they took a canoe and went to the scene. They examined the tree stump and allegedly noticed blood on it. From there they went to a place called Chibuyu to phone the police at Siabuwa.

The witness told the court that he had been in the fishing camps area for a period of not less than 14 years. He knew the area very well. He said Sinamwenda River is crocodile infested and has a lot of hippos, he himself was an experienced swimmer who had been swimming from the time he was a small boy. He, however, could not say how good a swimmer the deceased was, but he held the view that the deceased could not swim to safety that day because of the assault allegedly perpetrated on him. He emphasised it was due to the assault that the deceased

disappeared into the water and he had never seen him again since that time.

The witness was subjected to skilful and thorough cross-examination for two days. Under cross-examination of the witness it was established that his level of education was Grade 6 which he did at a rural primary school. He told the court that he could not speak fluent English. It is also emerged under cross-examination that as the struggle was in progress in the middle of the river the first accused's cap fell off and drifted away. The said cap was found the following day on the shore in the vicinity of the scene of the alleged crime. Also found in the same vicinity was a piece of the broken oar. It was in fact the shaft or handle of the oar which measured 1.3 metres and weighed 0,72 kilograms. The portion of the oar that paddles was broken off. The witness was accused of being untruthful because he had initially said the two items were found in the vicinity when the sub-aqua team came and later said they had been found the following day. The witness had clearly made a mistake initially which he corrected. That the items were found is supported by the evidence of Mwinde who actually found the items. Even Sergeant Nyadore who was leading the sub-aqua team said the items had been recovered by the time they got to the scene about 4 days after the incident. The witness was also taken to task for saying the speed boat sustained a scratch when it rammed into the metal canoe since the police did not record that they had seen a scratch. Further the witness had said the broken oar was recovered from the accused's boat yet Mwinde who actually found it said it was found on the shore. It seems to me that the witness assumed that it may have been found in the accused's boat since he had last seen the accused using it to assault the deceased. What is important, however, is that the first accused, green cap and the broken oar were found in the vicinity of the alleged murder the following day.

The next issue that was dealt with at some length was that of the blood stains allegedly seen by the witness on the tree stump the next day. The witness told the court in cross-examination that the accused

assaulted the deceased with the oar on the head. The blows to the head caused him to bleed therefrom. When he went to cling to the tree stump he was already bleeding from the head. The witness then again indulged in an assumption by stating that when the accused drove the boat into the deceased the tree stump to which he clung must have pierced him and he bled from some injuries during that attack. He concluded that some bloodstains he allegedly saw the next day on the tree stump could have come from those injuries. The assumption was not unreasonable, in my view in the light of what the witness had witnessed the previous day. In my opinion what is important is that the witness said he observed some bloodstains on the tree stump the next morning when he was in the company of Mwinde and Makore. These two supported his story. They also allegedly saw some blood on the tree stump. Hence it does not really matter whether it came from injuries inflicted to the head with an oar or it came from the injuries inflicted by the boat when it was driven into him as he clung to the tree stump and sandwiched him.

Asked why the police did not see the alleged blood on the tree stump later in the day when they arrived the witness said it could have been washed away by rain drizzles which had been falling or even waves on the river.

The witness answered questions fairly. For instance, he told the court in cross examination that when the accused drove the boat into the deceased as he clung to the tree stump he fell into the water and sank but he resurfaced and called out to the witness in the Tonga language and said "Friend I am dying". He then sank for the second time and never resurfaced. When the accused realised that he may have drowned, they appeared, to the witness, to be making efforts to locate him and save him.

The witness was also honest in his replies. When it was put to him that he was a well-known fish poacher he admitted that he had been arrested on many occasions for poaching and had paid fines for the offences. It was then suggested to him that he had no respect for the law

but he said that could not be true because each time he was discovered poaching he submitted to an arrest.

It was established under cross-examination that the two accused persons first cut the nets, which the witness and deceased had set, before ramming into the canoe with their speedboat. When it was then put to him that the accused could not risk damaging his expensive boat by ramming it into a metal canoe the witness said the first accused did that because he was so determined to do what he did that he did not mind about the consequences that would follow.

The cross-examination of the witness also established that Shaw did not phone the police during the presence of the witness, Mwinde and Makore.

The witness was labelled a stranger to the truth who told different stories to the police, the court and Mike Shaw. He then was asked questions to the following effect:

“Q You and the deceased absconded because you were near the bank.

You ran away into the bush.

A I have no reason to lie against these two white men. If he had died

in the bush I would have said so. There was no reason to lie.

Q But you do not know that he died.

A He died. He could not live under water for 3 days. He drowned.

Q You hate him (accused 1) because he disturbed you in your fishing activities.

A There are many white people there. Why should I pick on the accused from the 5 other whites who are there?

Q He cut your fishing nets

A There is another white man called Bailey. He would chase me while

he was armed with a pistol and would take my canoe away.

But I

would go back to him and collect my canoe. But I never reported him.”

It was established that that particular white man used to harass the witness. While armed with a firearm he chased the witness on the river not less than 7 times. He sometimes took the witness to the police where he paid fines.

Finally the witness emphasised that the deceased drowned in the middle of the river where the water was between 9 and 10 metres deep. The deceased never got to the shore of the river.

Contrary to the defence counsel's assertions that the witness was being untruthful he impressed the court as being honest and truthful. He did make some understatements about how fluent he was in the Shona and English languages. But people have a tendency of understating what they actually know. The witness certainly has a better understanding of the two languages than he wanted the court to believe although he may not be fluent in speaking them.

The mother of the deceased Mrs Muleya Muzamba told the court that her son was the third born. He worked at Chibiya as a fisherman for 4 years. The deceased's wife had pre-deceased him leaving one child who was in the custody of her grandmother - the witness.

Her evidence was that her son the deceased used to support her and the grandchild. She is a communal home dweller in the Binga area with no source of income. The deceased provided food for her on a monthly basis. He therefore had to go home every month with the food supplies. Few days before he disappeared he had been at home and had promised to return at the weekend but he never returned. She then received a report about his death from Mwinde and has never seen her son again ever since.

Sergeant Rodgerson Nyadore was the third witness. He has been attached to the sub-aqua unit for 4 years. He was presently stationed at Support unit at FairBridge in Bulawayo. He did not know both accused and neither did he know the deceased and the witness Siansole Muchimba.

On 30 November 2000 he was summoned to Binga to attend to a murder scene on the Sinamwenda River. His team proceeded to Binga the next day which was 1 December 2000. The Binga police led the team to the scene on that same day but they arrived late in the evening and could not do anything at that time.

On the morning of 2 December 2000 he was introduced to Siansole Muchimba as the witness who had witnessed the incident. At about 09:00 hours Muchimba led the team to the scene and indicated a point in the river where he alleged his friend had drowned after being assaulted by the accused. I pause to say that this piece of evidence is hearsay but is being recorded to show consistence in the report made by Muchimba.

The team of divers dived into the water at the scene and conducted searches under water in the hope of finding the body. They also carried out surface dives. They searched for an area of about 700 square metres but they could not find the body. The team of divers did not search for the body in the bush because the report they had received was that the deceased drowned in the river after an alleged assault by the two accused.

The witness said the water at the alleged scene was between 9 and 10 metres deep. It was his evidence that a body takes about 3 day to float after drowning under normal temperature. It took less than 3 days when the temperature is high. He said when a human body is floating it can be moved by water flowing even very gently.

Finally the witness confirmed that he was shown the green cap and the broken oar which had been recovered before the arrival of his team of divers.

Samuel Mwinde was the next witness. He is a brother-in-law of the deceased. He is married to the deceased's sister. His home is at Kalonga Village in the Binga area. He works at Sinamwenda Fishing Camp as a kapenta fisherman.

His testimony was that at about sunset on 28 November 2000, as he was washing dishes after the evening meal, Muchimba arrived in a half

dressed state. He was only dressed in shorts with no shirt on. He made a report to him to the effect that the deceased had drowned and died at the place they were fishing after he had been allegedly assaulted by the two accused persons.

The two then decided to go to Michael Shaw in order to ask him to radio the police at Binga. On the way they met Makore who joined them after a report was also made by Muchimba. On arrival at Shaw's place a report was made but Shaw appeared to be unwilling to phone the police. He suggested the three should return the next morning.

The next morning the three i.e. Muchimba, Makore and the witness went back to Shaw's place. On arrival they saw the first accused leaving Shaw's premises. The accused did not speak to them at that stage. When they requested Shaw to radio the police at Binga he instead suggested that they should go to the scene and locate the body first. He further suggested that they should also go and check at the deceased's residence to ensure that the deceased was not at his home.

The three then left and proceeded to the scene. On their way to the scene the way they used passes near the first accused's camp. As they were walking past the first accused saw them and said words to this effect - **"I do not want to see you here."** These words were interpreted by Muchimba to have been directed at him alone but Mwinde was not sure whether they were directed at the three of them or at Muchimba alone.

The three then took a canoe and went to the scene at the centre of the river. They then went to the dry tree stump. The witness estimated the part of the tree that was above water to be between 11 and 12 centimetres. On examining the tree stump he noticed some blood at its top. According to this witness it was not a lot of blood. Thereafter the three left the scene. There were some light rain showers which drizzled after they had left the scene and went to Chibuyu Fishing Camp to telephone the police at Siabuwa.

The witness was not clear when the police from Siabuwa arrived. He was not sure whether they arrived the same day a report was made -

i.e. 29 November 2000 or the next day 30th On November. However, when they arrived a number of people gathered. The police were then taken to the scene in the middle of the river and to the tree stump. He said there was no more blood on the tree stump when the police examined it.

The witness went on to tell the court that it was he himself who found the green cap belonging to accused one and the broken oar. The portion of the oar that paddles the water was broken off. Both exhibits were found at the shore in the vicinity of the scene.

Muchimba identified the broken oar as one of those he and deceased had been using. Both items were then taken by the police. He confirmed that the river was crocodile infested as he was familiar with the river since his business is that of kapenta fishing on the river.

He was the one who went to report the alleged murder to the mother of the deceased. He never saw the deceased again after the alleged murder.

Under cross-examination the witness said he understood and could speak a bit of Shona. He believed Muchimba could also understand and could speak Shona. When it was put to the witness that the first accused had a conversation with Makore relating to pots he emphatically denied that such a conversation took place. His evidence was that the first accused was leaving Shaw's premises when the three arrived there. The first accused never spoke to them at Shaw's house. He only did so when he saw the three walking past his camp on their way to the scene. He said he did not want to see Muchimba there. There was no discussion about any missing posts.

It was established under cross examination that after searching for the body without any success the three went back to Shaw and requested him to phone the police but that was when he made a further suggestion that they should go and check at deceased's residence to ensure he was not there. Shaw said they should not rush to report to the police. Shaw did not phone the police while the three witnesses were at his premises.

The witness was described as being unreliable by the defence counsel because his evidence differed with that of Muchimba on where the broken oar was found. He said he had found it floating at the shoreline while Muchimba had told the court that it had been found in the first accused's speedboat. The other discrepancy was that the witness said there was some blood on the dry tree stump but it was not much and the blood was no longer visible when the police went to examine the tree stump. But Muchimba had said there was a lot of blood which was still visible when the police examined the stump.

It seems to me that what is important is that the two items were found by this witness at the shore in the vicinity of the alleged murder. The paddle of the wooden oar had broken. Similarly what is important, in my opinion, is that the witnesses noticed some blood on the tree stump when they visited the scene in the morning. Contrary to the defence counsel's suggestion that the witness was unreliable, I found him to be reliable and he had no reason to be untruthful. He did not know the two accused persons and would, therefore, have no reason to tell lies against them.

The next witness was Stanley Michael Shaw a white man who resides at his fishing camp at the Sinamwenda fishing camp. He had been in that area for 18 years at the time of the alleged murder. He knew the first accused as he was also a fishing camp operator. He came to the area and was allocated a stand towards the end of 1999. The second accused was known to him only in connection with this matter. He did not know the deceased at all but he knew Muchimba since he was a fisherman in the area.

At about 8 p.m. on 28 November Muchimba, Mwinde and Makore arrived at his premises. Muchimba made a report to him to the effect that the "boss" from camp 6 had beaten him and his friend and the friend drowned. The man referred to as "boss" from camp 6 was the first accused. Shaw said he then disbelieved Muchimba and there and then told him he did not look like some one who had been beaten to him.

When Muchimba requested to radio Binga Police Shaw told him that they had no communication with Binga police at that time as it was late. The witness then suggested that the three could return the next morning at 7:30 a.m.

Indeed the three returned at 7:30 a.m. as arranged but Makore allegedly told the witness that he wanted to have a check at the scene first since it was day time before informing the police by radio. The three then went away to the scene and returned at about 10:00 a.m. Again Makore allegedly said the witness should not radio the police yet because he wanted to go and check at Chibuyu, where the deceased used to live, and would return. Makore allegedly radioed him from Chibuyu reporting that the deceased had not been seen in the Chibuyu area and told the witness to then go ahead and radio the Binga Police which he did.

Shaw had summoned the first accused to his premises in the morning of 29 November 2000 in order to confront him with Muchimba. But the accused left Shaw's premises when the three were arriving. The accused and the three witnesses passed each other at the gate.

The witness explained that he had to tell the three witnesses to return at 7:30 a.m. because his radio communication closes at 5 p.m. and only opens at 7:30 a.m.

The witness also confirmed that the river was crocodile infested. He went on to say the death toll resulting from crocodile attacks was fairly high in that area. Crocodiles account for about four (4) or five (5) deaths each year. He, however, claimed that the body of a person killed by crocodiles does not completely disappear. There are always some traces of clothing or part of the body.

In cross-examination he denied that he refused to radio the police because he wanted to talk to accused one first. He further denied saying that he did not want to radio the police because he did not want to be a witness. Shaw confirmed under cross-examination that he was one of those whites in the area who have had Muchimba arrested. But

Muchimba still used to go to Shaw's shop freely thereafter. Apart from causing Muchimba's arrests the two had never quarrelled.

It was his evidence in cross examination that apart from the river being crocodile infested the surrounding area which is National Park is a home of some big game such as elephants and lions which have killed people as well.

It was also his evidence that when police came the accused's boat was examined. The result was that no dents or scratches were seen on it. Police also examined the boat for any traces of blood. He also revealed that the police had to examine the dry tree stump for blood which Muchimba had said was half way up the stump. The police could not see any traces of blood on it. The witness further revealed that Muchimba described to him how the deceased was killed. Despite the description that was given the witness still disbelieved Muchimba and told him that he did not appear like a person who had been beaten up. Because Muchimba described fully how his friend was allegedly killed the witness concluded that he (Muchimba) was fluent in English.

When further cross-examined the witness told the court that Muchimba altered his story the following morning and began to allege that the accused used an oar to beat them up. But the witness did not tell the court what Muchimba had said, the accused had beaten them up with the day before. Muchimba may not have given the details of the assault because the witness interrupted him by saying to him he did not look like some one who had been beaten up.

Towards the end of the cross-examination Shaw said Muchimba had indicated that their canoe had capsized about 4½ metres from the shore. The water was relatively shallow and could have been a metre to a metre and half deep. This, of course, cannot be true. The police and witnesses could not have used boats to go to a scene which was just 4½ metres from the shore.

The witness corrected himself in re examination by State Counsel. He than said the scene was quite a distance from the shore. They had

used boats to travel to the scene for about 100 metres. He said the canoe had capsized about 10 metres from the dry tree stump. What is clear therefore is that the tree stump, according to Shaw, was at least 90 metres from the nearest shore.

When questioned by the court the witness said he only went to the scene two days after the alleged murder. The following questions and answers are part of what took place between the court and Shaw:

“Q Accused 1 came to your premises, what did he want?

A I called him over to confront Makore and others.

Q What did the accused say to you?

A He said he bumped their boat over.
-One guy got out of the water.

Q You are quite sure that he said he bumped into their boat

A Yes

Q This was in the morning of 29 November 2000.

A He said he went there to try and get the net and the boats bumped into each other.

Q What did you say to him?

A I said Muchimba had given me another story.”

Shortly after saying accused had said he had bumped their boat over and one guy got out of the water the witness then quickly changed and said they both ran out of the water.

Under matters arising from the court’s questions the witness appeared to want to create the impression that he was confused when he said the accused said his speedboat bumped into the canoe causing it to capsize.

This was a very reluctant witness who deserved to be criticised. He was not telling the truth when he said he did not say he wanted to speak to the first accused first before he could radio the police. That is so because he did exactly that the next morning before he radioed the police. He said he summoned the accused in order to confront him with the witness Muchimba but when the three witnesses arrived at his place he let the accused leave the premises without confronting him with the

witnesses. Quite clearly he had called the accused in order to ask him about the alleged murder but when the three approached he let the accused go.

He also wanted to create the impression that the scene was about 4½ metres or 10 metres from the shore. There was no need for the police and witnesses to use boats if the scene was so near and the water was shallow.

Further he behaved strangely, when a report was being made to him, by saying the witness did not look like someone who had been beaten up when regard is had to the nature of the report that was being made. One wonders how Shaw wanted Muchimba to look like in order to satisfy him (Shaw) that he had been beaten up.

The last state witness was a member of the ZRP Special Constabulary at Chibiya Fishing Camp. His name was James Makore. Makore knew the first accused as a fishing camp operator at Sinamwenda Fishing Camp. He only knows the first accused in connection with this matter. He did not know the deceased at all.

On 28 November 2000 he was on night duty at the fishing camp when he was approached by Muchimba and Mwinde. Muchimba reported to Makore that the deceased had been assaulted by the two accused and fell into the water and drowned at Sinamwenda.

The three then went to Shaw's premises. On arrival, the story of the drowning of the deceased was narrated to Shaw who said it was too late to radio Binga police when requested to do so.

At about 8 a.m. the next morning the three went back to Shaw's premises. They saw the first accused leaving the premises as they arrived. Makore alleged he suggested to Shaw that they should visit the scene together but Shaw allegedly refused. Makore further alleged that the three then went to the first accused's camp. He said he wanted to ask the accused if the allegations made by Muchimba were true but the first accused said he did not waHB071-03DOC 16161616161616161616"ö.Ò
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was identified by Muchimba as one of the oars that was being used by him and the deceased.

Makore again contradicted the evidence of the other witnesses by saying the cap belonging to the first accused was recovered by Muchimba. He was clearly mistaken because the evidence before the court established that it was in fact found by Mwinde. Further, Makore alleged that Muchimba had some scratches on his back as a result of the assault upon him by the accused. Finally the witness said he had never worked for the first accused. He emphatically denied ever having had a quarrel with the first accused over missing pots.

The issue of the witness working for the first accused was pursued in cross-examination but the witness vehemently denied it. It was also persisted that the witness had a heated argument with the first accused over the missing pots. But the witness appeared to be very surprised and emphasized that he did not even know the first accused. He did not even know that the accused had a fishing camp.

This witness may have been mistaken about certain events that took place. For instance he said Muchimba had scratches on his back but that seems to have been something that he had been told. He said Muchimba was said to have been without a shirt but at the time he met him and Mwinde he had a shirt on. It is therefore doubtful if Makore himself saw any scratches on Muchimba's back. It is equally doubtful that Makore in the company of Muchimba and Mwinde went to the first accused to confront him with the allegations made by Muchimba. But what admits of no doubt is the fact that the three saw the first accused twice that morning. Firstly they met him as he was leaving Shaw's premises. Secondly, they saw him as they were going past his camp and he said words to this effect "**I do not want to see you here**". Which words Muchimba believed were directed at him. The State closed its case after the evidence of Makore.

The defence counsel applied for a discharge of both accused persons. Written submissions were then filed by both defence and State

counsel. After considering the submissions the court dismissed the application and indicated that its full reasons would be incorporated in the main judgment.

These are they. Although there are some discrepancies in the evidence given by the State witnesses my view is that it cannot be said that evidence is unreliable. What has emerged from the evidence is that Muchimba was on the river with the deceased and the two cast their nets. Shortly after that the two accused persons arrived in the area and started to cut the nets. After cutting the nets the first accused drove the boat at high speed towards the canoe, in which Muchimba and the deceased were, and rammed into the canoe causing it to capsize. This was in the middle of the river where the depth of the water was at least between 9 metres and 10 metres. That the speedboat rammed into the canoe and capsized it is confirmed by Shaw who had no reason to lie against the accused. Shaw in fact was inclined to do and say things favourable to the accused that is why he did not want to report to the police before speaking to the accused about the allegations made. It also explains why he changed his story, after saying the accused had told him that only one of the persons, whose canoe had been rammed into and capsized had managed to run out of the water and said both people ran out of the water. The evidence that was led thus far tended to establish that the accused's boat rammed into the canoe and capsized it. The accused persons denied, in their defence outline, that the boats ever came into contact with each other.

Further the evidence also established that the accused's speed boat rammed into the canoe in the middle of the river which was not less than 30 to 40 metres from the shore as opposed to the 3½ metres suggested by the accused in their defence outline.

Muchimba told the court that the deceased was assaulted with an oar which broke into two pieces. The accused, thereafter, drove the boat onto his back as he clung onto the tree stump. He fell into the water and when he surfaced he told Muchimba that he was dying. With those words

the deceased sank into the 10 metres deep water and was never to be seen again.

After his friend had sunk into deep water Muchimba went to make a report. His report was consistent. He told Mwinde, Makore and Shaw that his friend was assaulted by the accused persons and drowned at the scene of the assault. He led the police to the scene and was still alleging that his colleague had drowned there. He also led a sub aqua unit to the scene to search for the body but it was not found. Why would Muchimba do all this if he did not actually see his friend drown? How would he have known then that the friend was not going to appear at his fishing camp or any of the fishing camps in the area? The deceased was a local fisherman who knew the area very well. He had been at the fishing camp for 4 years. It would have been unwise for Muchimba to say he had drowned if he had not.

The oar and the accused's cap were found in the vicinity of the alleged murder. The discrepancies on the details of how and where exactly they were found are immaterial, in my view. What is important is that a broken oar was found in the vicinity. The portion that paddles had been broken off. Muchimba identified the oar and he testified that one of the blows, aimed at the deceased with the oar, missed and landed on the boat. The oar broke into two pieces as a result. This story accords with the probabilities because an oar without the flat portion that paddles the water is of no use to any person, who uses a canoe.

Muchimba's evidence was that the accused's cap fell into the water during the attack and was only found at the shore the next day.

Three witnesses told the court that when they visited the scene the following morning they noticed some blood on the tree stump to which the deceased had clung when the first accused drove the boat into his back. The discrepancies of whether there was a lot of blood or just traces of blood are immaterial, in my opinion. What is important is that all the three witnesses saw something that they believed was blood. The traces of blood were no longer visible at the time the police examined the tree

stump. The witnesses said it could have been washed away by some showers that had fallen after the witnesses had visited the scene.

Muchimba's evidence was that the accused assaulted the deceased with an oar inflicting injuries from which he bled. The blood seen by the witnesses on the tree stump must have come from the deceased before he allegedly drowned.

The above summarises the court's reason for holding that the State had established a *prima facie* case against the accused persons. In the result, they were put on their defence.

Each of the accused gave evidence and two witnesses were called to support their story. The first accused Russell Wayne Lubushagne had this to say.

On 23 November 2000 he went to Binga District Council to collect two councillors to go and mark kapenta fishing camps at the Sinamwenda River. At the same time he wanted to show the councillors the extent of the poaching in the area. On arrival at the camp he took the councillors up stream and showed them where fish had been scaled. There were a lot of fish scales on the bank. There was a lot of fish that was being dried. He said a lot of fires could also be seen on the bank. He then mentioned to the councillors that there was a well-known poacher by the name of Siansole Muchimba but he had not met him himself. On hearing that the two councillors allegedly authorised the accused to remove any nets that he saw on the river.

The next day they went to Chibiya fishing camp to mark the stands for the Kapenta Fishing Company. They were joined by about 12 people who assisted in marking the stands. The procedure took almost a full day. Muchimba was amongst the group that assisted in marking the stands. One white man called Mike Taylor indicated Muchimba to the accused who in turn indicated him to the councillors.

The councillors confronted Muchimba about the poaching which he denied. The councillors are said to have exchanged words in a language which he did not understand but at the end of the exchange one council

official repeated in English that should Muchimba be caught poaching again his licence would be cancelled.

As stands were being marked and allocated Muchimba allegedly asked the accused if he was going to give him a job. Whereupon the accused said he would consider that should there be any development.

The council officials left for Binga the next day but before they left they introduced the accused to the local councillor to whom he was told to report any poaching activity that he came across.

On Sunday the accused went out fishing with two of his friends. While they were on the river the accused saw Muchimba in the company of another person. The accused approached Muchimba and asked him what he was doing. Muchimba and his colleague did not have any nets or fish. The accused assumed he was checking the nets. Muchimba is said to have said words to the effect that he would have no money if he did not fish on the river. He is alleged to have asked the accused to allow him to fish in the river. But the accused told him that it was illegal to fish with nets in that area. The accused went on to remind Muchimba that he would report him to the local councillor the next morning. The accused then alleged that Muchimba became very loud and aggressive and told the accused to get out of the river. He is further alleged to have told the accused that that was his (Muchimba's) river since he had been there for many years and the accused had just got to the area. The accused then drove away.

I need to pause here and observe that there was no basis for the accused to assume that Muchimba and his colleague were poaching since they did not have any nets or fish in their steel canoe. What the accused did amounts to harassment and was uncalled for in the circumstances.

The accused went on to say despite not having seen any nets or fish he went to report to the local Councillor the next day that he had seen Muchimba poaching fish in the river. That report was not true because he had just seen him in the river but there was no evidence that he was fishing with nets.

On Tuesday the day of the alleged murder the accused party went out fishing for bream on the Sinamwenda river. At about 1p.m. the two accused left their party and went for tiger fish on Lake Kariba. After they had travelled for about 150 metres the first accused's cap was blown off his head as he drove his boat. He tried to recover it but was unable to do so due to the turbulence and he left it. They went tiger fishing and returned at about 5.30 p.m.

When they were about 300 metres from their party he noticed a net going from a tree in the river to the shore. He then cut both ends of the net. He then noticed a steel boat approximately 200 metres away. It was about 8 metres from the shore. He then drove his speed boat towards the steel boat. Shortly after he had taken off towards them he noticed them quickly paddling towards the shore. He drove his speed boat towards them as they continued to quickly paddle towards the shore. He slowed down to see what they had when he was 2 metres from their boat. By that time they were about 3 metres from the shore and they jumped out of their steel boat into the water which was about 5 feet deep. They could both stand. Muchimba left the water first and ran into the bush without looking back. The deceased followed about 5 metres behind. The accused looked into their steel boat but only found a knife in it. He, however, claimed to have found a net in the boat the next day.

The two accused went to rejoin the rest of their fishing party which was about 100 to 120 metres away around a bend. The first accused said his clothes were completely dry when they rejoined their fishing party.

The accused told the court that the area where Muchimba and the deceased had come out of the water was extremely rocky and it was therefore not possible for footprints to be seen. The fishing party then went to the accused camp. The accused said Muchimba's canoe was still floating close to the National Parks shore. The accused told the party about the two poachers he had encountered. The party also saw Muchimba's canoe floating close to the shore.

He described Muchimba's boat as a 3 millimetres thick steel boat. It had two buoyancy tanks to save it from sinking. It has sharp edges. He said his boat was made of fibreglass and was valued at 4½ million dollars. He said if he had driven it into the steel boat it would have had a mark at the point it came into contact with the steel boat.

In the evening his party went for a braai at the section of the shore which was sandy. The braai ended at 10 p.m. and the party went back to the camp. They did not look for Muchimba's boat that evening. He, however, saw it the next morning tied to a tree on the other side of the river. He went to it and on looking inside he noticed some nets inside. The accused had gone fishing again in the morning when he saw the boat. As he was preparing to go tiger fishing one of his workers informed him that Shaw wanted to see him.

He went there and found a group of nine fishermen by Shaw's gate. Shaw told the accused about the drowning of the deceased. He went on to say Makore was going to investigate the matter. The accused told Shaw to call the police. Having said that he left but was met at the gate by Makore and eight (8) others. Makore complained to the accused that his workers had stolen some of his pots. The accused told Makore to sort that out since he was a policeman himself. To the accused's surprise Makore spoke to him about the missing pots instead of the drowning incident. Makore allegedly continued to menace the accused about the missing pots. The accused told him 20 times to go and report to the police. At the end the accused told him to go away. The whole group of nine followed while Makore was talking about the missing pots. He was followed for about 80 metres. Makore never mentioned the drowning incident to the accused and none of the people in the group of nine ever did so. When Makore was told to go away by the accused he allegedly said he was going to sort out the matter. The accused then left and went to his fishing camp where he carried on fishing. His party returned from tiger fishing at about 11 a.m. for breakfast.

It was only then that Makore and Muchimba and in the company of about three other people approached the accused and alleged that the accused had killed the deceased. Makore had in his possession a broken oar and said he was going to report to the police.

When the police came all interested parties went to the scene. According to the accused the scene was at the shore. It was the accused's story that Muchimba never mentioned seeing blood on the tree stump. He said it was Makore who mentioned the blood and also produced the broken oar. When the tree stump was examined no blood was seen. The accused claimed that the police were not convinced by the story related by Muchimba and they even allegedly said, "It was a far fetched made up story." The tree stump was not broken. He disputed the suggestion that the blood could have been washed away because the tree stump was in a valley where there was no wind. He claimed that if one put blood on the tree stump it would never be washed away.

The police examined his boat but no signs of damage or marks were seen on it. They never at any stage said they would take the boat as an exhibit. Muchimba never mentioned any mark on the boat to the police. His boat has one rail on the driver's side but has no rail at the front.

From the scene the accused said he went with the police to his camp where they requested for beers. One of them took a coca-cola while two of them had castles. At no stage did they say they would be arresting the accused. He was only arrested when he went to Siabuwa some 3 days after the event.

The accused said he conversed with Muchimba in English and in the accused's view he spoke perfect English. This assertion, in my view, cannot be correct because Muchimba only went as far as grade 6 at a rural school. He may speak some broken English but not perfect English.

The accused said there was no bad blood between him and Muchimba but believed that he must have been upset by the fact that he was going to be reported to the local councillor.

In conclusion the accused repeated what Shaw said about crocodiles not eating the body completely. He said the two ran into the National Park which is home to a lot of elephants, buffalo, lions and hyenas. He could have been killed by such animals.

Under cross-examination the accused said he showed the councillors about 7 different places along the bank of the river where a lot of fish scales could be seen. That to him, suggested that poaching was very rampant in the area. When asked why Muchimba, who had challenged the accused two days earlier, ran away the day of the alleged murder. The accused said he (Muchimba) ran away because (he) accused cut his nets. That in my view, does not explain why he would have run away because he had told the accused two days earlier that he should go away from his (Muchimba's) river. He had told the accused that he had been there since his youth but the accused was just a recent arrival in the area. A man would not run away after a new comer had cut his net. Muchimba had been arrested many times and even at gun point. He has been shot at. It is therefore highly unlikely that he would just run away from an unarmed newcomer.

The accused admitted in cross-examination that Shaw had no reason to tell untruths about him. So Shaw had no reason to lie that the accused told him that the accused's boat bumped into Muchimba's boat which capsized "and one guy ran out of the water". This was the accused's reply when Shaw told him that Muchimba had said his friend had drowned.

When the accused was asked why he did not want to confront Muchimba in the presence of Shaw after he had been told that Muchimba was making such serious allegations against him the accused said he decided to ignore him since he had told Shaw to call the police. This is highly improbable. Muchimba was present. An innocent man against whom such serious allegations were being levelled would have sought for an explanation from his accuser in front of Shaw.

The accused also maintained that Makore kept on talking to him about the missing pots. This is also highly improbable and unlikely. According to the accused nine (9) fishermen had gathered. Muchimba had reported to them about the deceased having drowned after the assault by the accused. Makore would not come up with the question of the missing pots when all the people were waiting to hear him question the accused about the alleged murder. The accused wanted the court to even believe that Makore repeated that 20 times. That story of the pots is clearly untenable. It did not happen that is why none of the witnesses heard it. If the accused was at all questioned by Makore the questions related to the drowning of the deceased.

The accused said Mwinde's version that Muchimba had no shirt when he arrived at his place and reported the drowning of the deceased was probably correct.

It came out in cross-examination that when accused made indications to his lawyer Muchimba was not there. He was not even there when photographs were taken. The accused could not explain why Muchimba would create such a story against him when there was no bad blood between the two of them. A number of whites in that community had done worse things to him. Shaw has had him arrested. A man called Bailey has shot at him and had him arrested at gunpoint. He had caused his arrest on less than 7 times and had on occasions confiscated his boat. All he had done was to approach Bailey and reclaim his boat but had never created such serious allegations against any of them.

Walter Ryan Claasen - the second accused adopted the story given by the first accused. He went to Sinamwenda fishing camp on 26 November 2000. He was going to celebrate his birthday on 29 November 2000. He was not present when the first accused met Muchimba who allegedly told him to get out of the river since it belonged to him (Muchimba). The second accused met Muchimba for the first time on 28 November 2000.

He said when the police came they never attempted to arrest him and his co-accused. They never said they would take the boat as an exhibit. In my view, nothing turns on the fact that the police did not try to arrest the accused at that stage. The correct procedure, where there is no likelihood of the accused interfering with the evidence or absconding, is to gather enough evidence first before arresting the suspect. Similarly no useful purpose would have been served by taking the boat as an exhibit if its production was not going to take their case any further.

The accused who grew up on a farm said he was very conversant with Shona. He therefore clearly heard Muchimba speak Shona. He finally said their boat did not collide with that of Muchimba and he never had a fight with Muchimba and the deceased. He never got his clothes wet.

Under cross-examination he confirmed that he was a passenger while the first accused was driving the speedboat. He, like the first accused, could not give an acceptable explanation why Muchimba and his colleague would run away from them. He also could not explain why Muchimba maintained his story if that did not in fact happen.

The first defence witness was Richard Barnes. This witness did not take the defence case any further. His view was that the accused could not commit such a serious crime. It was his evidence that when the accused returned from tiger fishing he did not see anything unusual about their clothes or demeanour. Their clothes were dry. In his view the two accused were not guilty of any misdemeanour judging from their appearance. His evidence was that the depth of the water in the river was 3 to 4 feet. That, of course, cannot be true because there was evidence that the water was at least 9 to 10 metres deep.

This witness also told the court that he was not aware that somebody had drowned. He went on to say when the police arrived they appeared to be on a casual visit. He only learnt about the murder allegations when the accused were arrested at Siabuwa some three or four days after the event. There was no truth in that because that was a

small community many people must have been talking about the drowning incident after Muchimba had reported it.

That was confirmed by Wayne Newton Brebner who said their party talked about the incident after the police had left. Barnes' story that the police appeared to be on a casual visit is also not true. They would not have examined the accused's boat and would not have taken some boats to go to the scene in the middle of the river if they were on a casual visit. The witness had come to court to give character evidence that is why he said the accused's clothing was not wet at all. His story is rejected.

The next witness Way Newton Brebner also did not assist the accused. It was his testimony that on 26 November when he and the first accused saw Muchimba in the river (Muchimba) was poaching because he saw some nets in the boat. That contradicted what the first accused told this court. The first accused said there were no nets in the boat. All he could see inside the boat was a knife. His story that Muchimba was fishing on that day was just mere speculation as there was nothing to show that he was indeed fishing. His evidence does not take the defence case any further.

After considering all the evidence that was led in court I arrived at the following findings: I find that Muchimba went fishing with the deceased. Shortly after they had cast their nets the two accused arrived in the speedboat which was being driven by the first accused. The accused cut the nets and thereafter drove at high speed towards Muchimba's boat and rammed into it at a right angle causing it to capsize thereby throwing out its occupants. A struggle ensued. The deceased clung to the speedboat. He was beaten up by both accused. The second accused held him while the first accused beat him up with an oar. Which broke into two pieces. Muchimba made good his escape by swimming to the shore. From the shore he watched the accused beating up the deceased and the first accused drove the boat into his back as he clung to the dry tree stump. He watched the deceased falling into the water and

emerged later and said he was dying. He sank and was never to be seen again. The deceased never came out of the water.

I also find that after convincing himself that his colleague had drowned as a result of the assault he set out to go and report. He repeated the story of the deceased having drowned to Mwinde, Makore, Shaw, the police from Siabuwa and the sub aqua team. He could not have been consistent if the deceased had not drowned.

He identified the broken oar which the accused had used during the assault. He had no reason to lie against the two accused. He was not a deliberate liar as suggested by the defence counsel. His story about the assault and subsequent drowning of the deceased remained intact. Shaw who was a reluctant witness supports the version that the accused bumped into Muchimba's boat and capsized it. Shaw also had no reason to lie against the accused.

It was also the court's finding that the accused were clearly being untruthful when they denied that their boat bumped into Muchimba's boat and capsized it. There is also no truth in their testimony when they said there was no scuffle in the middle of the river. Their story that both Muchimba and deceased ran out of the water is also clearly false. They said the boat was about 3½ metres from the shore as they drew close to it. That is not true and is rejected. It was in the middle of the river not less than 35 to 40 metres from the shore. That is why boats had to be used to get to the scene.

It is common cause that the body of the deceased was not recovered. I have however, found that Muchimba saw the deceased sinking into the water and drowning. Muchimba put it well under cross-examination by saying the deceased could not have lived under water for 3 days.

The defence counsel complained that the accused may not have received a fair trial because of the questions that were asked the accused and their defence witnesses by the court and assessors. Counsel's concerns were without foundation in my view. Firstly for instance Shaw

only made the revelation that the first accused had told him that his boat had bumped into the canoe and capsized during the questioning by the court. The court questioned each witness who appeared to be hiding something be he defence or state witness.

I now turn to consider the circumstantial evidence that was placed before

the court. It has been laid down that on a criminal charge the fact that the murdered man was killed, like any other fact can be proved by circumstantial evidence, being evidence which leads only to that one conclusion of fact, although no body is found. See *R v Onufrejczyk* 1955 (1) All ER 247. DUMBUTSHENA CJ in *S v Shoniwa* 1987 (1) ZLR 215 (SC) approved the above statement of law at 218E-F and continued that the court must, as in any other criminal case, be satisfied beyond reasonable doubt of the guilt of the accused person. He went on to state that in order to convict a person where no body has been found there need to be no confession establishing the guilt of the accused. There must however, be sufficient evidence to establish the *corpus delict*. That evidence can be wholly circumstantial, provided it is sufficient to preclude every reasonable inference of the innocence of the accused.

In casu Muchimba saw the deceased sinking into the 9 to 10 metres deep water in the middle of the river. To borrow Muchimba's words "the deceased could not have lived under water for 3 days".

What are the accused guilt of? After ramming into the canoe the accused jointly assaulted the deceased with an oar. He was hit all over his body and bled from the region of the head. He swam and went to cling to a dry tree stump. The first accused drove the speedboat into his back. The accused knew he had already injured the deceased who was bleeding but nevertheless drove a boat into his back. This happened in the middle of the river where the water was 9 to 10 metres deep and the nearest shore was about 35 to 40 metres away. It must have been clear to the accused that driving a boat into the back of the deceased who had been incapacitated by the assault with an oar would possibly result in

death but the accused proceeded with his actions with a reckless disregard as to whether or not death ensued. It cannot be said that his aim and object was to kill the deceased. He, in my view, is clearly guilty of murder with constructive intent.

The second accused acted in common purpose during the initial assault with the oar. He held the deceased while the first accused belaboured him. But after the deceased had gone to cling to the tree stump there is no evidence to show that the second accused knew that this colleague was going to drive the speed boat into the back of the deceased sandwiching him between the tree stump. He was not in control of the boat to stop the first accused from driving it into the deceased. While there is no evidence to suggest that he did not discourage the first accused from driving the boat into his back there is equally no evidence to suggest that he encouraged him or knew that the first accused was going to do that. The second accused can only be guilty of assault with intent to do grievous bodily harm.

The court's verdict is as follows:

Accused One:

Guilty of murder with constructive intent.

Accused Two:

Guilty of assault with intent to do grievous bodily harm.

Sentence

Accused 2

When addressing myself to sentence I will take into account what has been said on your behalf in mitigation. You are still a first offender who is still single but you have a fiancée. You are a professional hunter. The first accused is 15 years your senior. To some extent he had some influence over you. But he certainly did not force you to take part in this

murderous assault. You took hold of the deceased while the first accused beat him up with an oar. The attack was completely unprovoked. The deceased was defenceless. You showed no remorse at all.

For quite some time the court was thinking of sending you to prison for a short period but because you are a first offender I have decided to give you one more chance and impose a heavy fine conjoined with a totally suspended sentence. In the circumstances the justice of the case will met by a fine of \$30 000 or in default of payment 5 months imprisonment with labour. In addition 4 months imprisonment all suspended for 5 years on condition that the accused is not convicted of any offence of which assault or any violence to the person of another is an element, committed within that period for which the accused is sentenced to imprisonment without the option of paying a fine.

Accused 1

All that needed to be said relating to your personal circumstances has been ably laid before the court by your learned counsel. I therefore need not repeat it here.

You learned counsel urged me to impose a less severe sentence on you. I am

afraid I am not with him there. Instead I find that there is very little that can be said

in the accused's favour. The only point being that Muchimba told the court that the

accused appeared to be looking for the deceased when he sank into the water and

drowned. But we do not know that he indeed was intending to rescue him. The

accused himself does not say so. Hence it cannot be said with any degree of

certainty that that is what he wanted to do. The opposite could also be speculated.

It can be speculated that since he was on the murderous attack with the boat he may

have wanted to perpetrate further assaults. This is all speculation and no weight

should be attached to it.

The assault was a bad one, in my view, because it took place in the middle of

the river where the nearest shoreline was 35 to 40 metres away. The water was 9 to

10 metres deep. The deceased was first assaulted with an oar. Injuries from which

he bled were inflicted. The deceased's boat had drifted away. He had no means of

getting to safety considering that he had been injured. As if the assault with an oar

was not enough the accused went on to sandwich the deceased between the boat and

the tree stump. He drove the boat into the back of the deceased as he clung to the

tree stump.

The assault was completely unprovoked. The accused said he believed that

the deceased was breaking the law that if course, is no excuse whatsoever for the

accused to embark on such a murderous attack. The accused was completely

unremorseful. Having drowned the deceased that same evening he organised a

braai. The next morning he went fishing as if nothing had happened. Shaw called

him and told him about the drowning of the deceased. He just said, "call the police"

and left to go fishing. He appeared to be more interested in his fishing business

than anything else. If he had cared about the death of the deceased one would have

expected him to have suggested that a search for the body be conducted.

Instead the accused was creating a story designed to mislead every one by

saying the deceased had run out of the water and could have been killed by wild

animals in the National Park.

Any person committing a murder in these circumstances such as these needs

to be adequately punished. The punishment should fit the crime, the offender and

should meet the reasonable expectations of society. If the offender is not adequately

punished society would revolt.

In the circumstances I am of the view that the justice of this case would be met

by the following sentence.

"Fifteen years imprisonment."

Attorney-General's Office, legal practitioners for the State.

James, Moyo-Majwabu and Nyoni, legal practitioners for both accused.