

THE STATE**Versus**

- 1. EVIDENCE RUZIVE**
- 2. ADVENTURE RUZIVE**
- 3. HABSON CHAMATUNGWA**
- 4. SURPRISE MASHAVIRA**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J with Assessors Mr W.T. Matemba & Mrs C.J. Baye
GWERU 6 OCTOBER 2015

Criminal Trial

T. Mupariwa for the state
M. Mapfumo for 1st accused
E. Mandipa for 2nd accused
H. Ndlovu for 3rd accused
T. Zishiri for 4th accused

TAKUVA J: The accused were charged with murder in that on the 24th of May 2013 and along Runde River, Shurugwi in the Midlands Province, the accused persons or one or more of them unlawfully caused the death of Wellington Mashava by stabbing him with a knife twice on the chest, once on the left shoulder and once on the left back and by striking him with logs on the neck and face intending to kill him or realizing that there was a real risk or possibility that their conduct may cause death and continued to engage in that conduct despite the risk or possibility.

All accused persons pleaded not guilty to the charge.

The state outline was produced as exhibit 1. In it the state alleged that on the 24th May 2013, the deceased and the accused persons were panning for gold. Later, in the evening of that day, they were at a make-shift bottle store where an argument ensued between accused 1 and the deceased over allegations that the latter had earlier on stolen the former's cell phone. The deceased struck accused 1 with an iron bar on the neck prompting accused 2, 3 and 4 to join in

the fight on accused 1's side. The three used fire brands to strike deceased on the neck and face. Accused 1 then pulled a knife and stabbed the deceased with it on the chest and back. The deceased cried out for help and fell to the ground. He died shortly thereafter and a report was subsequently made to the police. Deceased's remains were ferried to United Bulawayo Hospitals for a post mortem examination.

Accused 1's defence outline was produced as exhibit 2. The accused denied the charge raising self defence and provocation as his defences. He admitted stabbing the deceased twice on the chest in self defence. In paragraph 6 of his defence outline he stated that after stabbing deceased twice as indicated above, he "left the scene whilst accused 4 was assaulting the deceased with logs". In paragraph 5 of the defence outline, he said deceased hit him with an iron bar on the "neck" and continued assaulting him with "open hands". He also said the issue of the stolen cell phone had caused a long time misunderstanding between the deceased and himself.

Exhibit 3 was accused 2's defence outline wherein he denied the charge of murder. He indicated that he took no part in the stabbing of deceased on the day in question. According to him when he got to the scene, he found accused 1 and deceased fighting while Simbarashe Madhubeko and others were watching. He then saw "accused 1 lifting the deceased from the ground. The 4th accused then struck the deceased with a log at the back of the neck on the left side. When deceased was struck with the log, he dropped a knife that he was holding in his hand. The 1st accused then picked up the knife and stabbed the deceased twice on the chest. The 4th accused again hit the deceased with the log at the back of the neck and under the right shoulder. The deceased then fell down. The 1st and 4th accused then ran away from the scene. As he picked a bucket to fetch water he was apprehended by Simba who tied him together with 3rd accused with shoe laces.

Finally he denied assaulting the deceased at any material point arguing that he did not act in common purpose with the 1st and 4th accused persons in assaulting the deceased. He prayed for a verdict of not guilty.

Exhibit 4 was accused 3's defence outline wherein he denied the state's allegations. In paragraph 8 of this outline, he stated that whilst he was at a point where sadza was being sold, he "realised that a fight had broken up (*sic*) between accused 1 and the deceased. He then went to the scene where he noticed that accused 2 arrived running inquiring what was happening. He heard accused 2 warning accused 1 against using a knife in the fight. In paragraph 11 he said he believed deceased died as a result of stab wounds inflicted on his person by the 1st accused. Further, he said deceased was assaulted by the 4th accused using a log and he denied "any participation as alleged or at all in bringing about the death of the deceased. He also prayed for his acquittal on the murder charge.

Exhibit 5 was the 4th accused's defence outline. He too pleaded not guilty outlining that on the fateful evening he was drinking beer with fellow gold panners when a misunderstanding ensued between accused 1 and the deceased culminating in deceased striking accused 1 with a "crow bar and he fell down. In paragraph 6 of this outline he stated that he "2nd accused and the 3rd accused started hitting the now deceased with a log they had taken from the fire". In paragraph 7 he said "he witnessed accused 1 standing up and going on to stab the deceased on the chest. Deceased then fell down and accused 2 and 3 were apprehended at the scene. He denied ever causing deceased's death.

Exhibit 6 was accused 1's confirmed warned and cautioned statement in which he said the misunderstanding was over his cell phone that deceased had stolen. The material parts read as follows: "At about 2100 hours, the now deceased started inquiring whether I was serious about what I had initially asked him. He then hit me once with an iron bar on my neck. I then grabbed and pushed him to the ground and I started assaulting him several times with fists on his face. At that moment, Adventure Ruzive, Habson Chamatungwa and Jonasi Musengi joined in and the trio started assaulting him several times all over his body using logs which they had taken from the fire. Some people who were nearby, whom I do not know by names came to stop the fight since Wellington Mushava was about to die. Adventure Ruzive and Habson Chamatugwa were apprehended but I and Jonasi Musengi managed to flea"

Exhibit 7 was accused 2's confirmed warned and cautioned statement. In that statement accused 2 stated that when he got to the scene, he saw accused 1 grabbing deceased by the jacket while holding an okapi knife. He asked accused 1 why they were fighting and he said deceased had struck him with an iron bar. He then warned accused 1 against using a knife but accused 1 ignored him. In an instant accused 1 then stabbed deceased twice on the chest with the knife. Accused 4 then struck the deceased on the back of his head and he fell down. He said he then picked a bucket in order to fetch some water to pour on deceased but was apprehended before he could achieve this purpose. He denied assaulting the deceased.

Exhibit 8 was accused 3's confirmed warned and cautioned statement. He said he saw deceased strike accused 1 with an iron bar and the two immediately engaged in a fight. Accused 2 asked him why the two were fighting and he informed him the reason. According to him, he saw accused 4 strike deceased twice on the back of his head and on the neck using a log. He heard accused 2 warning accused 1 not to use a knife. Although he claimed not to have assaulted the deceased, he was apprehended by Simbarashe Madhubeko at the scene.

Exhibit 9 was accused 4's confirmed warned and cautioned statement wherein he stated that accused 1 was hit by the deceased and he fell down screaming. Accused 2 and 3 then arrived and accused 2 stabbed the deceased once on the chest with a knife. Accused 3 hit deceased several times with a fire brand. Accused 1 then stood up and stabbed deceased once on his back.

Exhibit 10 was a post mortem report number 414-413-2013. The pathologist observed the following marks of violence;

1. Stab wound right chest (1cm) located 7cm from the right nipple, 7cm from midline, 7cm from clavicle.
2. Stab wound left chest (1cm) located 7cm from the left nipple, 7cm from midline, 7cm from clavicle.
3. Stab wound 1cm left shoulder

4. Stab wound 1cm left back

The heart itself suffered a stab wound in the left ventricle. Also there was 2.7 litres of blood in the lungs. He further remarked that the post mortem is consistent with wounds caused by a sharp object. As regards the cause of death he concluded that death was caused by:

1. Haemorrhagic shock
2. Haemothorax
3. Stab wound Heart
4. Homicide

The state sought admissions in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07 in respect of the following witnesses.

1. Edson Mahwite
2. Edison Masara
3. C. Nyikadzino
4. N. Mushangari
5. P. Pandukai
6. W. Muguti
7. Dr S. Pesanayi

There were no objections by all defence counsels and the evidence was admitted as summarised.

The state then opened its case by calling Simbarashe Madhubeko (Simbarashe) who lives at village 4 stand 18 Zhangwe in Shurugwi. He is a gold panner who knows all the 4 accused persons as neighbours and fellow gold panners. He knew the deceased as his neighbour and gold panner. He said all the accused persons and the deceased used to move together. He had known deceased for a period of 7 years before his death.

The witness said on the 24th day of May 2013 he was standing about 10 metres away when he saw accused 3 striking deceased on the neck with a fire brand. He also saw accused 2 striking deceased with a fire brand. Later he saw accused 4 hitting the deceased on the face with a fire brand he had withdrawn from the fire. Deceased cried out and as he cried out, he said he had been stabbed with a knife. At that time accused 1 was holding a knife and he apprehended accused 3 while accused 2 was apprehended by one Chikozho. Accused 1 and 4 fled the scene. A Mr Mangisi phoned Shurugwi Police. According to the witness, the spot was illuminated by fire and he clearly saw accused 2, 3 and 4 assaulting the deceased. When it was put to him that accused 1 will say he took the knife from the deceased in order to defend himself, his answer was;

“Accused 1 was holding a knife, I do not know where he had obtained it from”. Also when it was suggested to him that deceased was hit by accused 4 and he dropped the knife his response was, “they are better positioned but all I know is that they were assaulting him”. He further said accused 2 assaulted the deceased and he was restrained by one Brighton while he restrained accused 3 after he had assaulted deceased. As regards accused 4, he said he saw him assaulting the deceased as well.

Under cross-examination by counsel for accused 1 he conceded that he did not see accused 1 stab the deceased. Also he stated that he had not witnessed the earlier confrontation between deceased and accused 1. Asked by Mr Mandipa for accused 2 why he had omitted to mention the role played by accused 2 in his statement to the police, his response was “I do not know why its missing but I mentioned it”. The statement was later admitted as exhibit 11. Under cross-examination by Mr Ndlovu for accused 3, the witness said deceased and all accused persons were “panning gold together and staying together in the bush”. He insisted that it was the 3rd accused who first attacked the deceased and that he did not see deceased striking accused with an iron bar. He denied that he was falsely implicating accused 3 because deceased was his friend. He said deceased was accused persons’ friend as well. Further, he said all accused

persons were his friends. According to him the whole episode lasted a short time and the reason for tying accused 2 and 3 was to prevent them from escaping.

When asked by Mr Zishiri for the 4th accused when 4th accused joined in, his response was “at that time, all of them surrounded him joining in the fight”. He said 4th accused hit deceased in the face, accused 2 assaulted deceased at the back, accused 3 assaulted deceased on the neck while accused 1 was wielding a knife. He noticed later that deceased’s face was swollen. Under re-examination by the state counsel, the witness said he is illiterate as he never saw the inside of a classroom. Asked about the sequence of events, he said he first saw accused 2, 3 and 4 assaulting the deceased and later saw accused 1 holding a knife. He said although people searched the place for the knife, it was never recovered.

The state’s second witness was Edmore Marima the Investigating Officer in this case. After the case was allocated to him in June 2013 he uplifted accused 2 and 3 from Hwahwa Prison and recorded warned and cautioned statements from them. These statements were subsequently confirmed by a magistrate at Shurugwi. He then looked for accused 1 and 4. The former was arrested in Dorset by Constable Dovatova while accused 4 was arrested in August 2013 near Zvishavane (by Constable Chiteshe). He again recorded warned and cautioned statements from these two. The statements were later confirmed by a magistrate at Shurugwi. Accused 4 told him that he was also known as Jonasi Musengi. He said he was informed by Sergeant Masara that no exhibits were recovered at the scene.

The state then closed its case and accused 2 and 3 applied for discharge at the close of the state case in terms of s 198 (3) of the Criminal Procedure and Evidence Act and relying on the case of *S v Tsvangirai and Ors* HH-119-03.

The application was dismissed and I indicated that the reasons would be incorporated in this judgment. These are they:

(1) There is no merit in the submission by accused 2's counsel that there is no evidence that accused 2 played a role in the stabbing of the deceased. According to Simbarashe Madhubeko, the 2nd accused assaulted deceased using a fire brand. This amount to evidence upon which a reasonable court might convict. In *Tsvangirai's* case *supra* it was held that the court must discharge the accused at the close of the case for the prosecution where:

(a) there is no evidence to prove an essential element (b) there is no evidence on which a reasonable court acting carefully, might properly convict; (c) the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it.

In casu, it cannot be said that the evidence of Simbarashe was thoroughly discredited.

As regards accused 3 it was argued quite forcefully that the state had not established a *prima facie* case against him in that Simbarashe's evidence is to the effect that after accused 3 struck deceased with a log, he restrained him while deceased was stabbed shortly thereafter. It was contended that accused 3 could not have associated with consequences that occurred after he was apprehended. While this is a clever argument, it however does not stand the scrutiny of legal principles. The 3rd accused did not dissociate from the common project. He was merely prevented from further assaulting the deceased. Also a proper interpretation of Simba's evidence shows that accused 3 was eventually apprehended to prevent him from leaving after deceased had died. Can it be said at the time accused 3 was restrained, he no longer had the intent to injure deceased. The answer is in the negative. The deceased was still alive when accused 3 joined in the assault. Surely an accomplice in a murderous assault should not escape conviction for murder simply because quite fortuitously the injury which caused death was delivered at a time when he was prevented from continuing with the assault. This is so because he did not consciously decide to dissociate from the common enterprise. What is critical is that accused 3 by striking deceased with a log made common purpose with the others, one of whom eventually delivered the mortal wounds. For these reasons the application was dismissed.

Accused 1 then opened his defence by giving *viva voce* evidence. He stated that on the day in question he was drinking beer with deceased, Simbarashe and others when accused 3 called him to another fire place. As he stood up, he was hit with an iron bar on the neck by deceased. He fell down and deceased again struck him on the back uttering the words “Today I am going to kill you”. The deceased then sat on top of him while holding him by the neck. He saw deceased inserting his hand into his pocket and produced a knife. Accused 4 then hit deceased on the hand holding the knife. The knife fell down next to his right hand and he picked it up. He then stabbed deceased twice on the chest forcing deceased to rise and he got up when Simbarashe was saying he should be beaten. He then fled from the scene. Asked what part of the deceased’s body he aimed the knife he said he did not aim since deceased was pinning him down holding his neck, he just stabbed him. After stabbing deceased, he said he threw the knife down before fleeing from the scene. He was then arrested at Gwamanyanga in Fort Rixon. The accused closed his case as he did not have any defence witnesses to call.

Accused 2 then gave evidence in his defence. He said on the evening in question, he was informed by accused 3 that his young brother (accused 1) was involved in a fight with the deceased. At a distance he saw the accused 1 grabbing the deceased by the neck and the two fell down. He then saw accused 4 striking deceased with a fire brand. Shortly thereafter, he saw accused 1 holding a knife while he was on the ground and he immediately warned accused 1 against using a knife. Accused 1 ignored him and proceeded to stab deceased twice on the chest. He later said accused 1 was on top of the deceased and both rose and accused 4 then struck deceased twice, once on the back and neck. After deceased had fallen down accused 1 and 4 fled while he and accused 3 were apprehended at the scene.

Under cross-examination he changed his version and said deceased was on top of the 1st accused. He denied his version of events in the confirmed warned and cautioned statement. According to him he had been tortured at the scene, to the extent that he was confused when he gave his statement. At confirmation proceedings he said he informed the magistrate who ordered that the police were to investigate the matter. As regards accused 3’s role he said he did not see

him participating in any way. He failed to intervene due to fear of being stabbed with the knife. Finally he said when deceased pulled out the knife from his pocket it was open. He said he befriended deceased when they were in grade 5. Accused 2 then closed his case.

The 3rd accused gave evidence in his defence. He knew deceased and Simbarashe very well. Accused 1 and deceased quarreled in the morning and he prevented them from fighting. On the evening in question accused 1, 2, 4 and deceased, Simbarashe and himself were at a fire when accused 1 was hit by deceased and he fell down. Accused 2 got up and ran towards scene shouting; “Evidence do not use a knife”. He said he saw accused 4 hitting deceased twice on the neck and back. At the scene he did not see anyone with a knife. Later, he saw accused 1 running away. Accused 4 also fled the scene while accused 2 was apprehended by Simbarashe. Accused 3 then closed his case.

The 4th accused gave evidence. He stated that he knows all accused persons as workmates. He also knows Simbarashe as a workmate. Deceased was also known to him as a gold panner. Accused 1 and deceased had an altercation earlier in the day which was resolved by accused 3. On the day in question he was with accused 1, Simbarashe and deceased when accused 1 was hit by deceased. He said he jumped to the other side of the fire. Accused 2 stabbed the deceased and accused 1 got up and stabbed the deceased on the back while deceased was in a bending position holding his knees. He said he saw accused 3 assaulting deceased with a fire brand. As regards his sobriety, he said he was “in a drunken state” but was able to see accused 1, 2 and 3 attacking deceased. According to him, the deceased did not have a knife and accused 1, 2 and 3 are telling lies in order to absolve themselves. He then left for his rural home some 13 – 20 km away. He walked during the night.

Under cross-examination he said accused 1 stabbed deceased once on the back and accused 2 stabbed deceased once on the chest. He did not know how the other injuries were caused. He did not report the matter to the police. According to him, Simbarashe teamed up with accused 1, 2 and 3 to incriminate him because they are neighbours. The 4th accused then closed his case.

The issues are as follows:

- (1) Whether or not accused persons acted in common purpose by actively associating themselves in the unlawful assault that eventually caused deceased's death?
- (2) Whether or not accused persons had the requisite *mens rea*?
- (3) Whether or not accused 1 acted in self defence when he stabbed the deceased?

The following facts are common cause;

- (a) that Simbarashe and the four accused persons were gold panners working along the Runde River together
- (b) that all of them were present when the crime was committed
- (c) that the deceased struck accused 1 with a crow bar and he fell down
- (d) that accused 1 stabbed the deceased with a knife
- (e) that deceased died instantly from stab wounds inflicted during the assault.

The Law

Before analyzing the evidence led by the state and accused persons, it is necessary to state the law relating to the doctrine of common purpose. At common law the doctrine was defined by Burchell in *South African Criminal Law and Procedure* Vol 1, 3rd Ed at p 307 as follows:

“where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific conduct committed by one of their number which falls within their common design.”

In *S v Mubaiwa & Another* 1992 (2) ZLR 362 (S) it was held that;

“In the absence of proof of a prior agreement, accused number 6; who was not shown to have contributed casually to the killing or wounding of the occupants of Room 12, can be held liable for those events, on the basis of the decision in *Safatsa & Ors* 1988 (1) SA 868 (A) only if certain pre-requisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assaults on the inmates of Room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite mens rea, so in respect of the killing of the deceased, he must have intended them to be killed or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue”. See also *S v Mgedezi & Ors* 1989 (1) SA 67 (A) p 705 – 6 per BOTHA JA.

S v Safatsa 1988 (1) 868

S v Chauke & Anor 2000 (2) ZLR 494

S v Ncube S-90-90

The statutory provision that deals with the doctrine of common purpose is section 196 of the Criminal Law Codification and Reform Act Chapter 9:23. It states:

“A co-perpetrator is a person other than the actual perpetrator who;

- (i) was present with the actual perpetrator during the commission of the crime, and
- (ii) who knowingly associated with the actual perpetrator (and any other co-perpetrator) with the intention that each or any of them will commit or be prepared to commit the crime actually committed.”

Basically what the law states is that where these requirements have been met, the conduct of the actual perpetrator will be deemed also to be the conduct of every co-perpetrator.

Applying these principles to the facts of this case we note that the main ground of dispute in the case is whether the four accused persons or any of them are responsible for the deceased’s death? The evidence against and for each accused varies and consequently the case against each must be considered to a large extent separately.

In our view Simbarashe Madhubeko was an honest witness who did not exaggerate his story. He told a simple and straight forward story and was never shaken under cross-examination. In other words he remained firm, steadfast and consistent notwithstanding intense and searching questions from the four defence counsels. Put differently, his story remained intact without any embellishments. For example he told the court that he did not see where accused 1 obtained the knife from. On the evidence on record, if this witness wanted to exaggerate he could have easily said accused 1 took the knife from his pocket thereby contradicting the accused's version that deceased dropped the knife. Another example is that he conceded that he did not see deceased attacking accused 1 with an iron bar. An untruthful witness would have said deceased never assaulted the 1st accused especially where the witness was a friend of the deceased. His version of events as regards the sequence of events before, during and after the stabbing remained in one shape.

That version does not establish self defence in respect of accused 1 in that there was no time when deceased sat on top of accused 1. According to him the deceased did not get that chance because accused 2, 3 and 4 swiftly intervened by assaulting deceased as a group until accused 1 stabbed the deceased.

We therefore find Simbarashe a credible witness whose evidence we accept in tot.

On the other hand we find accused 1 to be an incredible witness for the following reasons:

- (1) Accused's confirmed warned and cautioned statement is contradictory to his defence outline in many material respects. As examples he admitted in the defence outline that he stabbed deceased twice on the chest with a knife, yet in the warned and cautioned statement he never mentioned the knife, never mind the more important issue of stabbing the deceased. He instead piled the blame on his co-accused persons for the death of the deceased. Also in the warned and cautioned statement he never mentioned the fact that he acted in self defence after deceased produced a knife or

- that he was intoxicated at the relevant time. In the warned and cautioned statement he said he was assaulted once on the neck by the deceased yet in defence outline he said deceased continued to assault him using open hands. There is yet another version he gave in his evidence in chief namely that deceased hit him with an iron bar on the neck and when he fell down deceased continued to strike him on the back with the iron bar. As if this is not enough, accused 1 gave another totally different version under cross-examination when he said he was assaulted three times by the deceased i.e. once on the head and twice on the back.
- (2) Accused's story is illogical in that when disowning his warned and cautioned statement he said the police assaulted him in order to compel him to admit the offence but when it was pointed out to him that he actually denied the offence, he changed and alleged that the police wanted him to tell them the role played by his co-accused persons. We find this reasoning illogical and weird in that it is strange and most improbable that the police would force him to incriminate his co-perpetrators while at the same time allowing him to exculpate himself. To the contrary, the tenor of accused 1's warned and cautioned statement is that of a person who freely and voluntarily denied the offence and incriminated his accomplices.
- (3) Accused's story is incredible in that while he told the court that he dropped the knife at the scene it was never recovered despite an extensive search. Also when asked why he did not report the crime to the police he gave a rather bizarre response namely that "his neck was swollen".
- (4) Accused 1 gave a contradictory and conflicting explanation of why he felt his life was in danger. When it was put to him that at the time he stabbed the deceased he (deceased) was no longer posing a threat to his life, his response was, he was, since the knife had not yet fallen down. Now it is his case that he used the knife that had been dropped by the deceased.
- (5) Accused gave an improbable story by denying ever owning a knife in his entire life when it would be expected to own one due to the environment and circumstances he lived under i.e. in the bush.

(6) Accused gave a false reason for fleeing from the scene. He said he was afraid of being assaulted. However, instead of reporting the murder to the nearest police station accused fled to a place in Matabeleland South called Gwamanyanga in Fort Rixon.

For these reasons we make the following findings in respect of the first accused;

- (1) he was not acting in self defence when he stabbed the deceased with the knife. Rather accused was simply retaliating. The evidence in its totality does not prove the requirements of self defence.
- (2) the deceased did not possess a knife at the time he was stabbed. The knife belonged to the accused and he took it away.
- (3) the accused acted recklessly in the manner he stabbed the deceased.
- (4) the accused used severe force to stab deceased more than once.
- (5) the deceased died from injuries inflicted by the accused.
- (6) the deceased had earlier assaulted the accused with an iron bar.
- (7) after the accused killed the deceased, he fled from the scene.
- (8) the accused was not so drunk as not to know what he was doing.

Moving on to accused 2, we find that he too was an untruthful witness. There are numerous differences between accused's defence outline and his warned and cautioned statement. In the warned and cautioned statement he said when he arrived he saw accused 1 grabbing deceased by the jacket while holding a knife, yet in the defence outline he said accused 1 lifted deceased from the ground and 4th accused then hit deceased. Also in the defence outline he said deceased dropped a knife after he was hit by accused 4, yet in the warned and cautioned statement he did not mention this at all. In the defence outline he said he did not speak to the 1st accused at the scene, yet in the warned and cautioned statement he said he warned accused 1 against using the knife but he took no heed. He also said in his warned and cautioned statement that he asked accused 1 at the scene why he was fighting with deceased, and he said deceased had assaulted him using a crow bar. Further, accused in his warned and cautioned statement said

accused 4 hit deceased once on the back of the head and he fell down yet in the defence outline he said accused 4 hit deceased twice (i.e. once on the back of the neck and once under the right shoulder). It should also be noted that this version is different from accused 1's version in that accused 1 said deceased was hit on the wrist by accused 4.

The sequence of events in the defence outline is also different from that in the warned and cautioned statement. It is highly improbable that deceased would have engaged in a fight with an open knife in his pocket. It is also highly improbable that the magistrate would have confirmed the warned and cautioned statement if accused had reservations. Further, it is highly unlikely that accused would simply watch his young brother being assaulted without either stopping the fight or join in to save accused 1.

Findings in respect of accused 2:

- (1) that he assaulted the deceased with a fire brand when he arrived at the scene.
- (2) that at the time he joined in the fight, the 1st accused's life was not in danger as the assault by the deceased had stopped.
- (3) accused acted recklessly
- (4) accused foresaw the real possibility that deceased might be stabbed to death by the 1st accused.
- (5) accused saw that accused 1 was armed with a knife but instead of disarming him he proceeded to assault the deceased.
- (6) accused was present during the commission of the crime and he knowingly associated with accused 1 with the intention that each will commit the murder.
- (7) accused intended to make common purpose with accused 1 and others by assaulting the deceased.
- (8) the assault is a manifestation of accused's sharing of common purpose with the other perpetrators.

As regards the 3rd accused, our view is that while he gave a consistent version of events in the warned and cautioned statement and his defence outline, he minimized his role during the scuffle. We say so because Simbarashe was quite categoric about what accused 3 did to the deceased. Accused 3 accepted that he was indeed apprehended by Simbarashe.

According to Simbarashe the 3rd accused was apprehended because he had assaulted the deceased with a fire brand. Simbarashe knew all the parties well. He had ample opportunity to see what was happening. We do not believe accused's evidence that he was arrested so that he would explain what had happened to the police.

For these reasons we make the following findings in respect of the 3rd accused person.

- (1) he was present at the scene where deceased was stabbed to death.
- (2) he joined in the fight by assaulting deceased with a fire brand.
- (3) that assault is a manifestation of accused's sharing of a common purpose with his accomplices
- (4) that he intended to make common purpose with his co-perpetrators.
- (5) he foresaw the real possibility that the assault might kill the deceased but proceeded reckless as to the consequences.
- (6) that he is an incredible witness whose evidence we reject where it conflicts with that of Simbarashe.

The 4th accused gave evidence in his defence. His version is also short with some variations between the warned and cautioned statement and the defence outline. He said he saw accused 1 stabbing deceased on the chest in his defence outline, yet in the warned and cautioned statement he had said it was accused 2 who stabbed deceased in the chest. In the warned and cautioned statement he said accused 1 stabbed deceased on the back. In his defence outline, he said accused 2 and 3 hit deceased with logs, yet in the warned and cautioned statement he said it was only accused 3 who hit deceased several times while accused 2 stabbed the deceased with a knife on the chest. Under cross-examination he said he never saw deceased wielding a knife. He

admitted that he left the scene that night and walked a distance close to 20km. What is surprising is that this is the only witness who said deceased was stabbed by two people namely accused 1 and 2. He said he was drunk when the incident occurred. It should be noted that accused 1, 2, 3 and Simbarashe say they saw accused 4 striking deceased with a fire brand. We do not find any reason why Simbarashe and the others would falsely incriminate accused 4.

We therefore find as follows:

- (1) that he was present at the scene where deceased was murdered
- (2) that he actively participated in the murder of the deceased by joining in the assault perpetrated upon the deceased.
- (3) that assault is a manifestation of his sharing of a common purpose with the rest of the accused persons.
- (4) that he intended to make common purpose with his accomplices.
- (5) that he foresaw the real possibility that deceased might be killed but proceeded nevertheless reckless as to the consequences.
- (6) that he is an incredible witness whose testimony we reject wherever it conflicts with that of Simbarashe.

Intention to kill

The issue here is with what intention did the accused persons commit the offence?

Actual intention occurs where an accused deliberately causes the criminal consequences. Put differently, the consequences will be his aim and object. On the other hand, legal intention or constructive intent or *dolus eventualis* occurs where an accused does not mean to bring about the criminal consequence but he engages in some activity which he subjectively foresees there is a real possibility that a criminal consequence may occur and he nonetheless proceeds with his activity, reckless as to whether or not the consequence ensues.

In casu, the 1st accused stabbed deceased several times with a knife. He inflicted these injuries on the upper part of deceased's body. From the injuries observed and recorded in the post mortem report, accused must have used excessive force. We say so because there was a stab wound on the heart. The weapon used is dangerous and caused lethal wounds. The deceased died from these injuries.

We note however that there was also an element of provocation coupled with intoxication. We find however that from the evidence, the 1st accused acted in order to revenge. As regards intoxication, we have already found that he was not so drunk as not to know what he was doing.

We therefore find all accused persons guilty of murder with constructive intent.

Sentence

In assessing an appropriate sentence, the court will take into account the mitigating factors advanced by the accused persons' defence counsels and what the state counsel submitted in aggravation. In particular the court will consider the following factors as weighty mitigating factors;

- (1) the accused persons are 1st offenders
- (2) they are youthful offenders
- (3) they endured pre-trial incarceration of close to 2 ½ years in circumstances where they are not to blame.
- (4) they are of lower intellect and unsophisticated.

As regards circumstances surrounding, the commission of the crime, it is a mitigating factor that the deceased was the initial aggressor. All accused persons joined in to rescue accused 1. If deceased had not conducted himself in that manner he would not have died.

There is also the element of provocation and a strong possibility that all had taken alcohol. Further, there was no premeditation.

However on the aggravating circumstances the courts have to uphold the sanctity of human life. Here life was needlessly lost under circumstances when that could have been avoided.

The use of the knife was totally uncalled for as accused could have stopped the fight without resorting to its use.

There is need to pass deterrent sentences in order to uproot the culture of lawlessness that has set in at gold panning sites.

Sentencing has various objects, rehabilitative and punishment. It is trite that factors can be combined to arrive at an appropriate sentence. *In casu* the court will combine these two objects of sentencing. It is hoped that accused will seriously consider reforming. The sentence we are going to pass is much lower than this case could have attracted had it not been for the mitigating features mentioned above. We will deduct a large portion of the normal sentence to encourage accused persons to change their ways.

For these reasons each accused is sentenced to 18 years imprisonment.

Prosecutor General's Office, state's legal practitioners
Mapfumo Mavese, 1st accused's legal practitioners
Gundu & Dube, 2nd accused's legal practitioners
Chitere Chidawanyika & Partners, 3rd accused's legal practitioners
Garikayi & Company, 4th accused's legal practitioners