

THE STATE
versus
ALFRED CHITATE
and
ALOUIS HUNGWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 September 2020

Criminal Trial

Assessors: Mr Msengezi
Mr Gweme

A. Masamha, for the State
G. Machingauta, for the 1st accused
C.T. Kathemba, for the 2nd accused

CHITAPI J: The two accused pleaded not guilty to two counts of murder which occurred on 15 February, 2018 at a place between Cotton Company of Zimbabwe and Mashonaland Tobacco, along Bulawayo – Harare Railway line adjacent to Lytton Road. The place is a known hangout for day prostitutes, drug peddlars and other unlawful vices which occur there.

In the 1st count the two accused were alleged to have assaulted the deceased Ernest kowo, with an iron bar and stabbed him with a knife on his body thereby causing injuries from which Ernest Kowo died. In the 2nd count, the two accused were alleged to have stabbed the deceased Tawanda Chirume three times on the stomach thereby causing injuries from which Tawanda Chirume died. In regard to both counts, the indictment alleged that the accused acted with intent to kill or with a realization of the real risk or possibility that their conduct might result in death but nonetheless persisting in the conduct despite such realization.

Both accused filed defence outlines. In regard to 1st accused, the gist of his defence was that he was not present at the scene of the brawl between the 2nd accused and the deceased persons when the brawl occurred. The 1st accused averred that he only arrived at the scene

sometime after the altercation aforesaid had already happened and that he found many people including police officers in the surrounds of the place where the deceased Ernest Kowo lay on the ground. He outlined that the only reason for his arrest was that police had information that he had been seen in the company of the 2nd accused on that day. He outlined further that he did not see the body of the now deceased Tawanda Chirume because by the time that the 1st accused arrived at the scene, Tawanda Chirume had already been ferried to the hospital as reported by people at the scene.

The 2nd accused's defence outline was a little more detailed than that of the 1st accused. He outlined that he had been away from his Epworth home for sometime before he returned on 14 February, 2020 only to find that his live in wife had left for an unknown destination leaving the house deserted. He then decided to go to the railway marshalling yards along Lytton Road to scrounge for wheat spillages from train wagons which will have carried offloaded produce that includes maize, wheat and other produce. The place he went to was also the same area where he fortuitously encountered his "wife" who was in the company of some six or seven women. The 2nd accused outlined that he had an encounter with the two deceased persons. He only knew Ernest Kowo, the deceased in the 1st count as he had known him well before the encounter. He stated that he was then threatened by Ernest Kowo who ordered the 2nd accused to sit down before Kowo and the deceased in count 2 joined hands to attack him using a knife and an iron bar respectively. The 2nd accused outlined that he engaged in a struggle with both deceased persons in an endeavor to defend himself from the attack being perpetrated on him by the two. In particular he outlined that he engaged in a prolonged struggle for the knife which Kowo was using to attack the 2nd accused and that suffered cuts on his right palm, right thigh and on his buttocks. As the 2nd accused wrestled for the knife with Ernest Kowo, the deceased Tawanda Chirume was striking the 2nd accused with an iron bar. He denied that he had possession of an iron bar prior to the altercation with the two deceased persons. He stated that it was the deceased Tawanda Chirume who was armed with an iron bar. Notably in the defence outline, the 2nd accused did not allude to the injuries suffered by the two deceased nor how the injuries could have been occasioned during the brawl. In summary, therefore the 2nd accused's defence outline was to plead the defence of person or self defence, so called, in daily parlance.

The 2nd accused in his defence outline also indicated that he challenged his confirmed warned and cautioned statement on three grounds, namely, firstly that the contents were not reflective of what he told the police. Secondly that the confirming magistrate did not cause the statement to be read to the 2nd accused. Thirdly, that police investigating officers were present in court during confirmation proceedings and that the police presence had an intimidatory effect upon him. The 2nd accused also outlined his position on indications. He outlined that he made indications whilst in leg irons and constrained by the leg irons to freely demonstrate what happened. Lastly, the 2nd accused outlined that he denied that Tawanda Chirume died of injuries sustained in the struggle which took place. The 2nd accused did not however suggest the cause of death in the defence outline.

During the course of hearing, the 2nd accused filed a supplementary defence outline on 28 February, 2020. The supplementary defence outline was prepared consequent on the submission by the 2nd accused that he intended to call a witness. The court directed the 2nd accused's counsel to comply with the provisions of section 66 (6) (b) (ii) of the Criminal Procedure and Evidence Act, [Chapter 9:07]. In terms thereof the accused who intends to call a witness at such accused's trial is required to prepare, file and serve on the prosecution, a document containing names of witnesses that the accused intends to call and a summary of the evidence of the witness concerned. The summary of evidence must contain sufficient detail to inform the prosecution of the material details to be relied upon in the evidence.

In the supplementary defence outline, the 2nd accused outlined that he would call a witness called Shine Jairosi as a witness. Shine Jairosi's outlined evidence was that he knew the 2nd accused from numerous encounters they had within Magaba / Mbare area as vendors where the witness would be selling various paraphernalia whilst the 2nd accused would be selling maize and wheat in most instances. The witness would confirm that he knew a state witness Margaret Hwinya as 2nd accused's wife. It was outlined that the witness mediated in quarrels between the 2nd accused and the 2nd accused's wife Margaret Hwinya several times. It was also indicated that the witness would speak to discussions which he held with the 2nd accused consequent on the 2nd accused's arrest as well to observations he made on the date of the alleged altercation which resulted in the 2nd accused's arrest.

The prosecution opened the state case by seeking admissions of certain evidence of state witnesses as outlined in the summary of the evidence of the witnesses concerned. The so called summary is a document prepared by the state in terms of section 66 (6) (a) of the Criminal Procedure and Evidence. It is in this document that the State lists the State witnesses proposed to be called at trial and the evidence of the witnesses is summarized. The provisions of section 66 (6) (a) are a flip side of the provisions of section 66 (6) (b) of the same enactment with the latter section being in regard to what the accused is required to do.

The witnesses whose evidence was admitted as summarized were firstly Moses Titus Mtisi. He is a police detail who attended the scene of the crimes following a report made at Mbare Police Station where the witness was based. On arrival at the scene he was shown the victims of the altercation. He observed Ernest Kowo lying on his back facing upwards without exhibiting signs of life. He also observed the deceased Tawanda Chirume lying near the body of Ernest Kowo, writhing in pain with intestines protruding from the left side of the body. Tawanda Chirume could still talk. On further examination of Ernest Kowo, the witness noted open cut wounds on the right forehead, right side of chest, on left collar bone, on the inside left arm, on outer part of left arm and on left elbow. Ernest Kowo also had a cut on the centre of the head and his clothes were soaked in blood, implying that he had bled excessively. The witness interviewed state witness Margaret Hwinya at the scene. The witness Hwinya identified the alleged perpetrators as the 1st and 2nd accused. The 1st accused was present in the crowd of on lookers. The witness arrested the 1st accused and arranged for the now-deceased Tawanda Chirume to be ferried to hospital for treatment.

The other admitted evidence was that of Addington Kanyuchi. He is a police officer attached to CID Homicide section and is a photographer. He attended the scene of the commission of the crimes herein and found the body of Ernest Kowo still at the scene. The witness noted visible injuries on the body of the deceased. The injuries were much the same as described by the witness Moses Titus Mtisi. The witness shot various photographs of the deceased Ernest Kowo before the body was removed to the mortuary. The witness assisted Moses Titus Mtisi in a search for any weapons which could have been used in the commission of the crimes, the search was in vain.

The last witness to have his evidence admitted was Tatenda Chirume, again a police officer and a brother to the deceased Tawanda Chirume. The witness evidence was that the deceased Tawanda Chirume experienced colon intestinal complications following the stab injuries he suffered on 15 February, 2018. The witness outlined that Tawanda Chirume was admitted for his colon problem at Harare Hospital on 3 October, 2018. He however passed on- on 4 October 2018 due to bowel obstruction secondary to adhesions. No postmortem was carried out before the deceased was buried.

It must be noted that the effect of making admissions by the accused in terms of section 314 of the Criminal Procedure and Evidence Act is that the admissions are taken as sufficient evidence of the admitted facts. From the admitted evidence therefore, the court accepted that the 2nd accused was no longer at the scene of the crime by the time police attended the scene. The 1st accused who was presented was arrested. The court accepted that Tawanda Chirume continued to experience complications with his colon after sustaining stab injuries inflicted on him on 15 February, 2018. It was accepted that his admission into hospital was consequent on the same colon problems which he continued to experience after suffering the stab injuries. It was further accepted by the court consequent on the 2nd accused's admission of the evidence of Tatenda Chirume that the deceased Tawanda Chirume died from bowel blockage or obstruction secondary to adhesions. The court also accepted the evidence of injuries on both the bodies of Ernest Kowo and Tawanda Chirume as detailed by the police witnesses whose evidence was admitted.

The issues falling for determination were therefore, firstly, whether both the accused assaulted the now deceased in both counts. Secondly, whether the second accused was the victim of assault by both deceased. Thirdly, whether the 2nd accused was the victim of attack since he averred that, he acted in self defence for his own protection. Fourthly, whether there was a *novus actus interveniens* unconnected to the injuries inflicted on Tawanda Chirume on 18 February, 2018 which resulted in the death of Tawanda Chirume. In considering all the evidence led in this case, the court had to consider the evidence in the light of the issues falling for determination. The evidence led will be considered herein below.

The first witness to give oral evidence was Stella Charlotte Mutemera. She knew both accused persons, the 1st accused for about 5 years prior to 18 February, 2018 and the 2nd accused

since 2014. The witness was a confessed day prostitute in that she would engage in prostitution during day time as she needed to be home in the evening to look after and be with her children at night. She knew the 1st accused as a vendor who would scoop wheat spilt from train wagons around the Lytton Road area for resale. As for the 2nd accused the witness had interacted with him when he sold a cell phone handset to a friend of the witness. There were problems with the phone and police became involved. The witness used to refer to the 2nd accused by various names such as Kudzi's father, Kitso, Christopher, Kabachi and Alois. The witness and the 2nd accused also originated from Zaka albeit from different villages. It is recorded that some evidence of bad character of this witness was adduced by the witness pertaining to 2nd accused's arrest and imprisonment for other unrelated offences. 2nd accused's counsel did not object to such evidence being led. The court was mindful to disregard the evidence and the assessors properly directed by the judge that such evidence be treated as immaterial to determining the issues for determination and the 2nd accused's guilt or innocence.

The witness testified that on the fateful day 15 February 2018 she was about her duties of soliciting for men at the usual hang up area which is the same area where the crimes charged were committed. She saw the 2nd accused arrive with another person whom she described as a boy named Shine. The 2nd accused was armed with a golf stick. He wore a yellow jersey and a short made from floral material and knee high stockings. The witness could not recall the type of shoes which the 2nd accused was putting on.

The witness stated that the 2nd accused then accused her of causing his arrest. It was around 1.00 p.m. 2nd accused ordered her to sit down on the ground whilst aiming to attack the witness with the golf stick. She dodged the blow and pushed the 2nd accused away causing him to fall down. The witness then ran away shouting that she would report to the police. She stated that the 2nd accused tried to chase after her but failed to catch up with her. The witness later saw the 2nd accused around 3.00 p.m. by the durawall of the nearby Mashonaland Tobacco Company (MTC) building. She was accompanied back to the scene by police details. She had left her cell phone handset which she wanted to recover. There were already 3 or 4 police details in attendance. She found the bodies of Ernest Kowo and Tawanda Chiruma still at the scene.

The witness testified that she knew the 1st accused well because she once was in a love relationship with the 1st accused's brother. She stated that she was a very close friend of another

state witness Margaret Hwinya and was not aware of a love relationship between the 2nd accused and Margaret Hwinya. She said that she only knew the 2nd accused as a person who had no fixed abode and that he stayed in a state of vagrancy within Matapi/Mukuvisi river area in Mbare.

The cross examination of the witness was not eventful. Her evidence was on the periphery in regard to the issue of the liability of the two accused for the death of both deceased's persons. The witness did not witness the altercation or brawl which ended in fatal injuries to Ernest Kowo and serious injury to Tawanda Chirume. The witness was not at the scene when the stabbings occurred. She had run away after being threatened by the 2nd accused. She maintained under cross examination by 2nd accused's counsel that she was not aware of any love relationship between her friend Margaret Hwinya and the 2nd accused. Nothing of note was elicited from the witness's cross examination by the 1st accused's counsel.

The gravamen of the witness evidence was to simply place both accused persons within the vicinity of the area where and around the time that the crimes were committed. The presence of both accused within the area was a common cause fact., the dispute being in regard to what they did. The witness gave her evidence well and the evidence was not contentious as it was not of much relevance to determining issues for resolution.

The next state witness was Margaret Hwinya. She stated that she was a day sex worker operating in the same area as the last witness. She knew both accused persons because they hung around the same area that she loitered for purposes of prostitution. She knew the 2nd accused as Kitso Kabachi or Christopher. She only came to know of the 2nd accused's name, Alois Hungwe following an incident involving the sale of a stolen cell phone and police ascertained his name. She knew the deceased Tawanda Chirume as her boyfriend and Ernest Kowo as someone who also frequented the area of her operations. The witness was an eye witness to the brawl which resulted in the death of the two deceased. Her evidence will therefore be dealt within a little more detail.

The witness testified that on the afternoon of 15 February 2020 between 2 p.m. and 3 p.m. she and other ladies of the day were sitting along the railway line soliciting for clients. They sat in places considered strategic catchment areas for prospective clients. From such strategic point she observed the 2nd accused approaching from the northern side using a footpath. The 2nd accused was in the company of Shine. The 2nd accused was holding an iron bar which she

described as made of wood and metal. They walked towards the place where the last witness Stella was seated along the railway line waiting for clients. She did not witness what transpired between the 2nd accused, Shine and Stella but saw Stella running away from and screaming and shouting at the other women including the witness to run away. The witness also took flight towards the main road where she intended to hitch hike a combi. The witness testified that she did not run far before she heard a man shouting to the women to check behind them because people were fighting. The witness then stopped to check behind her she heard the 2nd accused shouting saying "Paul sit down." She then saw the 2nd accused striking Ernest Kowo with the iron bar before dropping it to the ground. Ernest Kowo fell to the ground after being struck. The witness then saw the 2nd accused stabbing Ernest Kowo several times with a knife. She however did not see where or how the 2nd accused obtained the knife.

The witness saw Tawanda Chirume approaching the 2nd accused and persuading him to stop assaulting Ernest Kowo. The 2nd accused then turned towards Tawanda Chirume and stabbed him. Tawanda Chirume called out for help and walked to where the witness and other onlookers were. She observed that some flesh which she later noted to be intestines was protruding and dangling from one side of Tawanda Chirume's stomach. The witness saw the 2nd accused standing by the nearby flyover. The other women whom she had been with ran away. She was assisted by a passer-by who walked her to hike a kombi because she was scared of the 2nd accused. The witness then made a report to the police. She testified that 5 police details were assigned to accompany her to the scene. As she walked back with police details, she saw the 2nd accused still standing by the flyover. He ran away as the witness and the police approach in the 2nd accused's direction. On arrival at the scene the witness found that a number of people had gathered at the scene. She indicated to the police the body of Ernest Kowo who was confirmed dead and that of Tawanda Chirume who was still in pain but injured. The bodies were removed by police and ambulance respectively. The witness remained at the scene with police recording her statement.

The witness on being asked to clarify her evidence by the prosecutor testified that when she was prompted to look behind her as she ran away, she was about 40 meters from where she saw the 2nd accused and Kowo engaged in the brawl. She testified that she saw that Kowo and the 2nd accused approached each other from different directions. She stated that she saw the 2nd

accused stabbing Kowo. She however did not count the number of blows which the 2nd accused delivered on Kowo but that they were several. She said that Kowo was trying to wade off the blows with his hands. She stated that the 2nd accused stabbed Kowo indiscriminately. She testified that Ernest Kowo was on his feet when he was struck several times with the iron bar and fell down following the delivery of stabling blows. She stated that Tawanda Chirume implored the 2nd accused not to fight but the 2nd accused turned towards Chirume and stabbed him with the same knife which he had used to stab Kowo.

When asked as to how the 2nd accused left Kowo, the witness said that the 2nd accused only left Kowo after Kowo had fallen to the ground. She said that neither Kowo or Chirume was armed with any weapon. When he first saw Kowo before the 2nd accused had attacked him, Kowo was holding a cigarette which he was smoking. She testified that the 1st accused was present at the scene amongst on lookers but that he was not involved in the brawl. She however caused his arrest in that she advised police that the 1st accused had prior to the brawl been in the company of the 2nd accused. The witness denied that she was the 2nd accused's wife nor that she cohabited with him. She denied the 2nd accused's defence outline wherein it was alleged that the 2nd accused was the victim of the attack and that she was encouraging Kowo and Chirume to attack the 2nd accused. She testified that her relationship with the 2nd accused was not cordial because he used to threaten to assault her for causing his arrest whilst the witness would threaten to report to the police. The witness stated that she had on several occasions reported the 2nd accused to the police for threats made to her.

Under cross examination by counsel for 1st accused, the witness admitted that the 1st accused did not assault either Kowo or Chirume and that during the brawl, the 1st accused stood aloof as an onlooker. The witness only implicated the 1st accused because she had prior to the brawl seen the 1st accused in the company of the 2nd accused.

The cross examination of the witness by 2nd accused's counsel was lengthy. The witness denied that she ever met with the 2nd accused in 2010 nor that she engaged in intimacy with nor cohabited with the 2nd accused. She denied that and stated that she fell pregnant in 2010 by one Steven Katamha whom she cohabited with from 2010 until 2013. She denied being arrested for procuring an abortion in 2010 by Epworth police, the pregnancy being alleged to be by hand of the 2nd accused who was her cohabitant. She agreed that her nickname was Tinto but that her

actual name was Tendai. She said that the nickname Tinto was given to her because she was in love with Tawanda Chirume who was also nicknamed T.I. She denied that she had a plasma television set stolen and that she accused the 2nd accused of stealing it. She testified that on the day of the incident, although she first saw the 2nd accused in the company of Shine, she did not see Shine at the scene of the brawl. She last saw Shine when Stella, the first witness was being chased by the 2nd accused. She clarified that the iron bar which the 2nd accused wielded had a wooden handle and the rest of its body was metal. She denied that she saw the 2nd accused being assaulted by Kowo before 2nd accused retaliated. She stated that when the 2nd accused was assaulting Kowo, she then saw Chirume advancing towards the two. She said that the 2nd accused was holding the wooden/metal bar when she first saw him before he even attacked Kowo with it.

The witness was asked to comment on an apparent discrepancy between her evidence and her depositions in the affidavit recorded from her by the police. The discrepancy related to her deposition that Kowo and Chirume were together before the 2nd accused attacked them yet in her evidence she stated that it was Kowo who had an altercation with the 2nd accused before Chirume came in to try and stop the altercation. The witness stated that what she told the police was what she had testified to in court. She admitted that the deceased Chirume was her boyfriend. She stated that she would occasionally meet with Chirume and be intimate before Chirume went to his home. She agreed that she was hurt by the death of her boyfriend but maintained that she told the court the truth nonetheless. She admitted that she had an unfavourable impression of the 2nd accused because he was a bully who was at loggerheads with people most of the time. She however did not harbour any animosity towards him. She believed that it was the 2nd accused who harboured an animosity towards her because she caused his arrest over a phone handset which he had sold. The phone handset was later identified as stolen.

The witness explained that the deceased Chirume was her boyfriend although she did not stay with him. She stated that he stayed at his own place in Glen View and that she stayed with him in Glen View after suffering injuries at the hands of 2nd accused. She was helping to look after Chirume because of his injuries which required that he is under care. She stayed with Chirume as his wife. She testified that she did not know the reason why the 2nd accused stabbed Chirume. When it was put to her that she was the cause of the fighting which occurred on that day, she requested the 2nd accused's counsel to give details of what she did and how she caused

the altercation. When it was then put to her that she was in love with the 2nd accused, she laughed it off and responded as follows:

“Never. I can’t be in love with him. I am scared of him. I do not love him. Maybe he loves me but I was never in love with him. I was running away from the scene.”

When 2nd accused’s counsel put it to her that the fight was over her she denied the suggestion. She pointed out that if the altercation between the accused and Chirume was over her as suggested, this did not explain why the 2nd accused attacked Kowo and also attacked Stella who had to make good her escape.

The witness maintained that he was in love with Chirume for some 4 to 5 years and the affair was secretive. The affair was exposed following injury to Chirume at the hands of the 2nd accused. She denied that she was exerting revenge by falsely implicating 2nd accused. She stated that she was testifying only to what she witnessed. When asked whether she was Kowo strike the 2nd accused, she denied seeing him do this. When it was put to her that the 2nd accused suffered a stab wound on the thigh, during the brawl, the witness stated that she did not see any wound. She saw the 2nd accused walking properly without exhibiting signs of any injury and that he stood by a tree nearby as the witness waited to commute to the police in a kombi. She also saw the 2nd accused when she returned to the scene with the police. There were no signs of injury or blood which she saw on him. In re-examination the witness was asked whether the 1st accused participated in the brawl. She responded that he did not. She agreed that the police picked up the 1st accused because the witness had told the police of the presence of the 1st accused at the scene.

The court assessed the witness demeanour and the credibility of her evidence. The court formed the impression that the witness was worth of belief despite her engagement in the socially frowned upon practice of prostitution. She was not shy to disclose that she earned the living through engaging in the vice of prostitution. The witness gave her evidence with confidence and the evidence largely flowed without contradictions. She knew the accused persons well prior to the commission of the offence. The cross examination by counsel did not dent in any material way the gist of her evidence which remained largely unchanged in material particular. Her cross-examination was largely directed to try and establish that the witness had been a cohabitant (“wife”) of the 2nd accused, she denied the allegation. She denied that she was the cause of the brawl. She denied that the brawl was a result of her having double crossed the 2nd accused and the deceased Chirume. The witness denied any love relationship between her and

the 2nd accused. She however admitted being in a relationship with Chirume. She remained steadfast that she did not have any affair with the 2nd accused but that the 2nd accused bore a grudge against her as he believed that the witness had caused his arrest over a stolen cellphone handset which the 2nd accused allegedly sold to her friend. The refined cross examination by Mr *Kathemba* did not yield much and certainly did not result in a change in the witness' evidence.

The next state witness was Charles Kangoma, the investigating officer. His evidence was not contentious. He testified that he is a detective sergeant in the Zimbabwe Republic Police attached to C.I.D Homicide. On 18 May, 2018, he booked the accused persons from prison custody for indications following which a sketch plan was drawn. A copy of the sketch was produced through the witness as exhibit 4. It suffices that the scene of the crimes was a bushy area which is bordered by Simon Mazorodze Road on one side and Lytton Road on the other side. A railway line runs parallel to Lytton Road. There is no dispute on the sketch plan evidence. It was accepted by the court as evidence of the scene on the ground.

The witness was unable to obtain a post-mortem report in regard to the deceased Tawanda Chirume to use as evidence of cause of death. Chirume was buried without a post mortem examination having been carried out post his death. The witness however obtained a medical report which detailed the deceased's injuries and the treatment which he received. The witness indicated that from his investigations, there was no other evidence of the 1st accused's involvement in the commission of the offence other than the mention by the witness Margret Hwinya that the 1st accused was present at or around the scene in the company of the 2nd accused. Other than that, the witness conceded that there was no other evidence against the 1st accused. The witness charged the accused persons for murder in the second count following the death of Chirume. Before Chirume's death the charge against the accused had been one of attempted murder. The witness denied that the accused persons had complained of police assaults nor showed him any injuries. The investigations failed to recover the murder weapon.

The witness under cross-examination by the 1st accused's counsel reaffirmed his testimony that there was no evidence which he gathered to implicate the 1st accused in the commission of the two counts of murder as charged. Under cross examination by counsel for the 2nd accused, the witness admitted that the 2nd accused made indications whilst in leg iron as a security measure albeit making the indications voluntarily. Nothing of note came out of the

cross-examination. The witness gave his evidence well. The court believed the evidence. Much of it the evidence was not disputed.

Doctor Mungani gave evidence next. He is a consultant surgeon based at Parirenyatwa Hospital. The doctor chronicled the history of the deceased Chirume's treatments at the hospital. The doctor testified that hospital records indicated that Chirume was admitted into hospital with intestines perforated in two places. He performed a colostomy. The procedure entailed the removal of the intestines from the stomach and removed damaged parts before sewing the cut ends together. The deceased was to have returned to the hospital to close the stomach by sewing back the opening after putting the intestines back in place after 6 weeks. However, the deceased came back with intestinal blockage. The blockage resulted in bacterial infection of the outside areas of the intestines. The blockage itself consisted of faecal matter which was not being expelled from the intestines. The doctor testified further that the operation resulted in adhesions which caused the bowels to kink thereby restricting movement of contents of the bowels. Under cross-examination the witness did not discount that death could have been a result of intervening factors after the colostomy. There was however no evidence that there was an independent cause of death totally disconnected from the chain of causation of death starting from the attack on the deceased and consequent injuries suffered. The witness compiled a written report which he produced as exh 5. The report explains the medical history of the deceased since his admission into hospital on the date that he was stabbed. The doctor's evidence was clear and neutral. The court believed it.

The next witness was Edwmin Marecha, a magistrate presently stationed at Gweru Magistrates court. He gave evidence on how he confirmed the 2nd accused's warned and cautioned statement at Harare Magistrate's court where he was based on 28 May, 2018. The witness went through the motions of the procedure as set out in s 113 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] as further simplified in the proforma on confirmation which guides the magistrate on the steps which are done or taken. According to the witness, the court room was cleared of all person save for court officers. The 2nd accused was asked whether he objected to anyone else in attendance amongst court officials and the accused did not object to anyone being present amongst court officials who had remained in the court room. The statement was then read to the 2nd accused as well as details of where and by whom it was recorded

including the time of recording. The 2nd accused understood the contents thereof and confirmed making the statement freely and voluntarily without anyone influencing him to make it. The witness then confirmed the statement after reminding the 2nd accused of the purport of the confirmation proceedings.

Under cross examination the witness testified that he still recalled the confirmation proceedings in issue because he rarely presided confirmation proceedings since he was doing the remand court No. 6. He stated that he followed the proforma which sets out steps which are followed by the magistrate. He testified that he had been a magistrate for 14 years and was familiar with confirmation processes. When asked whether the 2nd accused had come from the police station or prison, he stated that he was not sure of his but emphasized that what was important to him was the creation of a conducive atmosphere for confirmation wherein the court was cleared of everyone except court officials. He denied that police officers other than court officials remained in the court room during confirmation proceedings. When it was put to him that the statement was not read to the 2nd accused before confirmation, he described the suggestion as a lie which was whiter than bond paper.

In the court's assessment of the witness and the evidence he gave, there was nothing to impugn. The evidence was clear. It was given in a forthright manner. Nothing of note was elicited in cross examination and the evidence of the witness remained intact. The court believed the evidence of the witness without reserve.

It is convenient at this stage then to deal with the 2nd accused's warned and cautioned statement produced as annexure 6B and the proforma as annexure 6A. The 2nd accused after being warned and cautioned of the murder of the Ernest Kowo in count 1 replied as follows-

ACCUSED'S REPLY TRANSLATED INTO ENGLISH

"Yes I have understood the nature of the caution and I admit to the allegations. What happened is that, when I was released from the Remand Prison in February 2018, I got to my place of residence where I stay with my wife one Tendai Simbi. However there was no one at home when I got there. On this day I spent the night at home with no blankets to cover myself since that wife of mine had taken away everything, and further to that she was now staying with another man. The following day, on 15 February 2018, I met with Alfred Chitate. Alfred Chitate invited me to come with him so that he would indicate to me where my wife was now staying. The two of us then proceeded to Lyton Road along the railway line which leads to Bulawayo, adjacent to Cotton. When we got there, I then saw my wife who was standing by the railway line. It was then that two men emerged namely Ernest Kowo and Tawanda Chirume, from the maize field which was just adjacent to the railway line. One of them was holding a knife and the other was holding an iron bar. When we got there these two men said to, "Hungwe, sit down". At that point in time

one of them threw an iron bar at me intending to strike me on the head, however I dodged. I then snatched the knife which Ernest Kowo had, I then stabbed him with it and proceeded to stab Tawanda Chirume also. I then left the scene and proceeded to Epworth. This is how I committed this offence.

Alfred Chitate did not commit any offence. He merely took me from my place of residence and came along with me to show me where my wife was. This was the place at which these two first attacked me. He never ever assisted me since he was just standing by when all this took place.”

The most significant part of the deposition in the statement is that the 2nd accused admitted to having stabbed both deceased person with a knife albeit he stated that he was reacting to an attack by them upon him.

It is also convenient to note at this stage that as regards the deceased Kowo, a post mortem report prepared by Dr Javangwe on 19 July, 2018 after examining the remains of the deceased showed that the deceased had chest stab wounds and died from “hemopneumothorax and hemopericardium and bilateral penetrating incisor wounds to the chest.” The post mortem report was produced as exh 1. The injuries noted were consistent with the 2nd accused’s admitted use of the knife on both deceased person. The death certificate of the deceased Chirume to evidence his death was produced by consent as exh 2. The fact that the 2nd accused stabbed the two deceased become common cause with the issue being whether the 2nd accused had a legally recognized excuse for his conduct.

After the evidence of the last witness, the State closed its case. Mr Machingauta for the 1st accused made an application in terms of s 198 (3) of the Criminal Procedure & Evidence Act for the discharge of the 1st accused at the close of the State case. He submitted that the State did not lead evidence to establish a *prima facie* case that the 1st accused is guilty of the offences charged against him. The State counsel conceded that the State had not established a *prima facie* case against the 1st accused.

The provision of s 198(3) aforesaid provide as follows:

“198 (3) if at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.”

In the case of *Prosecutor-General v Masvaire & Ors* 2015 (2) ZLR 471 (H). HUNGWE J after considering a number of decided cases held that the discharge at the close of the state case in terms of s 198 (3) can only be ordered in three circumstances, namely

- (a) where there is no evidence to prove an essential element of the offence
- (b) when 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.

Thus, where in such an application, reliance is placed on other grounds other than the three grounds above, the court that does so commits a misdirection.

I need in passing to comment that the provisions of s 198 (3) are intended to enable the court to control the proceedings before it. It is the court that considers at the close of the state case whether or not the accused should be placed on his or her defence. Thus, the accused moves the court to invoke the powers it has to acquit him or her in terms thereof. There is no provision that there be formal application made by the accused for his acquittal. Therefore what the provisions entail is that even if the court considers that the state evidence has not established a *prima facie* case, yet there has been no application made by the accused, the court should act *mero motu* and invoke the power given in the section. In such a case the court should ask the state counsel or prosecutor to make submissions on the evidence led if the court considers that there is no evidence of the commission of the offence charged by the accused. In *casu*, the prosecution conceded and in fact consented to the application. The concession does bind the court. This is so because the court has a duty to consider the evidence led and it is the court that must be satisfied of the innocence of the accused at this stage. I was satisfied that from the evidence led by the state, there was no evidence led against the first accused to link him to the commission of the offence other than that he had earlier before the stabbing of the two deceased been seen in the company of the second accused and was within the environs of the scene of the stabbing as aforesaid. Under the circumstances the first accused was acquitted of the charges pursuant to the provisions of s 198 (3) of the Criminal Procedure and Evidence Act.

The 2nd accused elected to give sworn evidence. He testified that he was married to the state witness Margaret Hwinya whom he has left at their rented home in Epworth when he fell into some problems which kept him away from home. He returned on 15 February 2018. He found the house deserted. When asked to comment on the denial of the alleged marriage relationship by Margret Hwinya, the 2nd accused stated that he would call a witness called Shine

to testify to the fact of the marriage. He stated that the marriage was not registered and he had not paid any lobola or performed any customary law marriage rites. He however stated that in 2010 Margret Hwinya had aborted a pregnancy for which he was the father. The witness Hwinya had caused the arrest of the accused after she falsely reported him to the police for procuring the abortion. The accused testified that the witness Hwinya withdraw the false charges and the two continued to stay together.

When it was put to him by his counsel that the witness Hwinya had denied that she was his wife, the accused responded that the witness had bought him some bananas to give him once the court adjourned. It was according to him a sign that the witness and him were lovers or husband and wife as he claimed. When asked why he thought that Hwinya was denying the relationship he responded that Hwinya deliberately denied the truth because she was afraid of being blamed by the relatives of the deceased Chirume for causing the death of their relative through double cross by Hwinya having an affair with both Chirume and the accused. He testified that of the two deceased he used to see Ernest Kowo at remand prison and they would also meet at court for bail application. He had two qualms with Kowo.

In relation to events of the fateful day, the accused testified that he woke up in the morning and decided to go to the railway lines area, to scrounge around for beans and wheat which would have spilled from wagons. He intended to sell the beans and wheat outside OK Supermarket, in Mbare just outside the Mbare long distance bus terminus. On the way to the railway wagons area he met up with one Shine a friend of his and he engaged in discussion with him. They were in the areas where the wagons were parked. It was at that moment that the accused saw a group of women who included Hwinya.

When asked to comment on the first state witness Stella Charlotte Matemero's evidence that the accused was in possession of a metal bar and that he assaulted the witness, the accused denied the evidence and stated that he did not see Stella at the scene on the date of the incidence. He testified that he engaged Hwinya in conversation enquiring as to where she was staying since she had abandoned home. Before Hwinya responded, the accused testified that he then saw the deceased Ernest Kowo approaching them from his right side. At the same time he noticed another person approaching from the accused's left side. Ernest Kowo then slapped the accused and started to assault the accused without a word. The accused stated that he retaliated and a

fight ensued, When the accused was getting the better of Ernest Kowo, Kowo produced a knife and stabbed the accused on the right thigh and in between the buttocks. The accused then held the knife back and was in the process cut on the palm.

When asked by his counsel whether there had been an exchange of words between him and Ernest Kowo before the accused was attacked, the accused responded that there was no conversation engaged in prior to the assault and subsequent fighting. The accused however stated that he enquired as of Ernest Kowo as to why Kowo was attacking him and Kowo did not respond except to continue the assault on the accused. The accused testified that at that juncture, Kowo's colleague joined the onslaught on him by Kowo. The accused however changed his testimony and stated that Kowo had come to attack him whilst brandishing a knife in his right hand. The charge being that the accused had initially stated that Kowo produced a knife when the accused was now getting the better of Kowo during the fighting. The shift in the evidence aside, the accused testified that Kowo's colleague came from the maize field holding a metal bar. The accused testified that as he held Kowo's hand which was holding the knife, they continued to struggle for it. In the process both the accused and Kowo fell to the ground. The accused testified that he is the one who now had the knife in his hand. At that stage according to the accused, the deceased Chirume upon realizing that the accused had overpowered Kowo then attacked the accused using the metal bar on the accused's back.

The accused continued with this testimony and stated as follows:

"I was not sure about what was taking place. I took the knife and stabbed Kowo and deceased."

When asked as to why he stabbed the deceased person yet it was him who now had the knife he responded that he was under attack with an iron bar and did not have any way out. He stated that he could not run away because he was under attack with an iron bar by deceased Chirume. He testified further that Hwinya was busy shouting and inciting the deceased persons to assault the accused because he was a useless person with many cases and that it did not matter whether the accused lost his life. He testified that he did not the number of times that he stabbed each of the deceased persons. He then threw the knife on the ground at the scene and went to his nephew's house in Epworth. When asked by his counsel as to why he did not report the incident to the police, he responded that he reasoned that police would not decline him since he has recently been released from prison. When asked to give more detail on the nature of his injuries

inflicted on him at the scene, he stated that the injuries were stab wounds on right thigh above shoulders and between the buttocks. The injuries inflicted during the struggle with Kowo for control of the knife. He stated that he treated himself of the injuries using a muroro (wild custard apple tree) medicine extracts . He stated that the use of muroro drains puss from wounds and heals the wounds.

When asked whether he knew the deceased Chirume prior to the incident, he responded that Chirume was a stranger whom he met for the first time on the date of the incident. When asked whether anyone could confirm the existence of the injuries allegedly inflicted on him, the accused responded that no one could do so because the accused kept to himself as he was afraid to be arrested by the police. He stated that the wound on his shoulder gets painful when the weather is cloudy. He lastly testified that he discovered after the event that the deceased Chirume was in love with the accused's wife Hwinya and that Chirume and Kowo were friends. He did not know why he was attacked because he had no grudge with both deceased since he had just been released from prison.

Under cross examination the accused insisted that he was married to state witness Hwinya and stayed together for 10 years. He however did not perform customary marriage rights. His friend Shine is the one who could vouchsafe to the accused and the witness Hwinya having cohabited as husband and wife. He did not know the names of the landlord where he stayed with Hwinya at various unnamed places where they cohabit. He however stated that Shine would visit him and Hwinya at all places where he secured lodging and stayed with Hwinya. When asked the name of landlord of the house which he used to stay in with Hwinya, the accused did not know the name although he testified that the landlord opened the doors of the house after he knocked on the door upon his return from prison.

In regard to events at the murder scene, he testified that when he went to the railway wagons area, he did not anticipate to meet with Hwinya. When asked about what the deceased Kowo did to him, the accused gave a different account of events. He testified that Kowo emerged from a maize field whilst the accused was conversing with Hwinya. Kowo ordered the accused to sit down in the following extract from the record in answer to questions by state counsel

“Q What was 1st deceased doing?

A He just came from the maize field and said Alois sit down

Q What did you say

A I was standing and said, what have I done. He did not answer. He then slapped me and I established.”

The order for the accused to sit down was a new dimension to the accused’s evidence given under cross examination.

The accused denied that Stella Challote was present at the scene albeit the accused admitted knowing her as a friend of Hwinya “his wife”. He agreed that during the altercation, a metal bar was used. However he is not the one who passed it contrary to what Stella and Hwinya testified to. When asked as to where Shine went to since he has been talking to him before he turned to converse with Hwinya, the accused stated that Shine ran away upon seeing the accused being assaulted by both deceased persons. The accused denied that the 1st accused Alfred was present and stated that he never saw him. This was despite the unchallenged evidence of Hwinya and the police attending details that Chitate was at the scene and was arrested at the scene. He agreed that a knife and iron bar were the weapons used during the incident though none of the two weapons belonged to nor had been produced by him. He agreed that he ended up being the one in possession of the knife but stated that he dispossessed Kowo of the same during the struggle.

When asked whether he complained to the court of remand about the injuries. He responded that he did so and the magistrate advised him to raise the complaint with the High Court. In this regard, it must be noted that in practice such complaints when raised before the magistrate the magistrate would enquire into them. The court fortunately had before it the remand court record of the accused, CRB HRE.P 6665/18 wherein the accused first appeared before the magistrate on initial remand on 29 May, 2018 and the magistrate noted after putting questions to the accused that he did not have any complaints. Equally, on confrontation of the accused’s warned and cautioned, there is a portion in exh 6 A, the pro-forma with standard questions one of which is to ask the accused if he has any wounds or injuries and he responded that he did not have any. The accused did not therefore raise the issue of injuries on initial remand and on confirmation of his warned and cautioned statement.

When questioned about his warned and cautioned statement, the accused again denied that he made the statement freely and voluntarily. He introduced an unexpected dimension to his defence when he testified that the confirming magistrate on exhibits 6A and 6B who testified in court was not the one who took him through the motions of confirmation. He stated that the

magistrate in question was a woman with rasta hair locks. When asked as to why he did not challenge the identity of the magistrate, the accused responded that it was because one is not allowed to interfere with court proceedings. This was what he said despite the fact that his legal practitioner would always revert to him the end of his cross examination of state witness to ascertain whether there were areas which the legal practitioner had omitted to cover. The accused also stated that he had not agree with the contents of the statement there were a lot of untruths contained therein. He painted out to some untruths like has alleged reference to his co accused Chitate and to Tendai Simbi in reference to Hwinya. It stated that the statement contents were largely correct to a $\frac{3}{4}$ or 755 degree. As regards his explanation for stabbing the two deceased he maintained that he stabbed them in a bed to find an escape route since he was under attack. The accused was asked as to how he left the scene and he responded that he ran away. When asked how he was able to run away in view of his professes injures, he stated that he did not run but walked. When asked what reason the deceased persons would have to attack him, he responded that it was because his wife Hwanya had an affair with the deceased persons.

In assessing the evidence of the accused, the court determined that his demeanour was poor and did not inspire confidence in the court as to the reliability of the evidence. To compound the poor impressions which the court forms of his showing, the accused gave conflicting accounts of how the altercation between him and the two deceased accused. The changes in the evidence have already been dealt with when outlining his evidence. A lot of effort was put in trying to show that the accused was in love with Hwinya. However the crux of the matter remained the main issue being what transpired at the scene.

The accused called as a defence witness his friend Shanie Jison. The witness states that know the accused since 10 years as they would meet in Mbare selling various wares as vendors. He testified that he knew the state witness Hwinya and the accused as husband and wife as they stayed together in Epworth. He stated that he was a stayed together in Epworth. He stated that he was a neighbor to the couple. He also stated that Hwinya and the witness' wife were friends. He testified that he met the accused on 15 February, 2018 within the railway wagons park area which is the area where the crimes *in casu* were committed. He had not seen the accused for a while. Who was in the company of 8 other women were nearby. Hwinya then came over to

converse with the accused and he left them to their privacy whilst he stood by the side where the rest of the women were.

The witness further testified that whilst the accused and Hwinya were still conversing, two men, a giant and a shot one emerged from a maize field whose sides were with grass. The giant was holding a knife and the other metal bar. He described the knife as an okapi type and gave the dimension as 15cm-20cm in length. He described the iron bar as being 80cm- 1 metre long the witness said that he stood behind the accused. The giant then ordered the accused to sit down in the following words;

“Sit down. What is the story here? What is happening?”

When asked to what then happened, the witness responded that he then realized that there was no agreement between the accused and the giant who now holding a weapon whilst giving orders with the accused not abiding the orders. No stated that ‘I was a scared for my life and field.’

The state counsel took time in cross examination to establish that the witness was lying in his testimony that he knew the accused and Hwinya to have stayed as husband and wife. The witness did not have details of the landlords or addresses of the houses where he alleged to have been lodgings used by the accused and Hwinya. When cross examined on the actual events of 15 February, 2018, then gave a different account from that of the accused on how the people who purportedly attacked the accused come to the scene. He testified that they emerged from the western side in a single file with the giant in front and the shot one not too far behind. When told that the accused had told the court that the assailants emerged from opposite sides he stated was one and the same thing. The witness also stated that when the accused was ordered to sit down, he responded asking the giant why he was interfering in the issue. He testified that the accused refused to sit down. He stated that he then back treated into the gross and fled. When put him that Hwinya had testified that it is the accused who ordered the deceased to set down, he responded that the order was made by the men who appeared from the bush. The witness deemed that he released his evidence with the accused as they were inmates. He stated that he only met the accused at prison reception.

In re-examination the accused stated that he stayed in a different hall at prisons him in C Hall and the accused in D Hall. They did not interact. He also gave fresh evidence that on the date the accused's arrest, Hwinya had approached him and reported the arrest to him as accused's friend before she told him that she was now fed up with him. The witness did not explain why he would have run away from a friend who had been besieged by two armed men whilst he was not armed nor sought help from police or other people to save his friend. When asked what the two men were doing with the knife and metal bar which they were holding, he said that they were just holding them. He stated that it was the giant who was ordering the accused to set down whilst he did not hear what the shot man was saying. The witness did not return to check on what had befallen the accused although the two were friends until around 5 pm when he heard that people had fought with a knife and one was dead. He did not find the accused at the scene or anywhere.

The witness did not impress the court as a credible witness. His account of events in relation to how the alleged assailants who threatened the accused emerged on the scene contradicted the accused's account. His evidence in regard to the possession of the knife what immediately happened also contradicted that the accesses. The accused first testified that Kowo approached him and slapped him before the two fought. He stated that it was only when he was getting the better of Kowo that Kowo produced a knife and they tussled for the knife. This was before he changed his testimony to say that Kowo approached him armed and ordered him to sit down. The witness testified to a giant approaching the scene already brandishing a knife with a shot man armed with an iron bar in tow. The witness did not witness the whole altercation as he unbelievably took to his heels leaving his friend at the mercy of armed men. His reactions were indicative of one who did not want to get involved for fear of giving contrary testimony to that of the accused. The court formed the impression that the witness was not truthful and was most probably nowhere within the vicinity. His testimony was in any event not very material because the witness professed nor to have seen what happened and resulted in the death of Kowo and serious injury to Chirume who succumbed to his injuries. The defence counsel closed the defence case.

Counsel submitted closing submissions. We thank counsel or their assistance. It is convenient to first deal with the causation element raised by accused's counsel. It was argued

that in the absence of a post mortem report in relation to the death of the second deceased, it could not be said that the claim of causation, being that the injuries inflicted by the knife resulted in the deceased's death was proved. In the view of the court, causation was not broken. In the absence of a *novus actus* interviewers being alleged or a factual foundation for it being established to infer it, the fact remained that the deceased Chirume suffered stab wounds which required hospitalization and management. His position worsened and it was related to the same complications he suffered. He died from injuries inflicted by the accused delivered stab wounds. It is not to the credit of the accused that the deceased did not die on the spot like the deceased Kowo. The fact that the deceased Chirume died months later did not alter the position that he survived the stab wounds for a while before succumbing to them

The court made adverse credibility findings of the accused and his witness Shine Jairoso whilst making positive credibility findings in regard to Stella Charlotte Mutomera and Margret Hwinyai as well as the police witnesses and the magistrate who confirmed the accused's warned and cautioned statement. In the warned and cautioned statement, the accused stated that an iron bar was thrown at him by one of the two men who emerged from the maize field armed with a knife and iron bar. The iron bar was aimed at the accused's head and he stated that he dodged it. He then stated, "I then snatched the knife which Ernest Kowo had. I then stabbed him with it and proceeded to stab Tawanda Chirume also. I then left the scene and proceeded to Epworth. This is how I committed the offence."

In the oral evidence the accused did not deny that he stabbed both the deceased persons. The court must therefore determine whether the accused had a valid legal excuse for stabbing the deceased persons. The accused pleaded self defence. The elements of the self defence or defence of person are set out in section 252 of the Criminal Law (Codification and Reform) Act. The elements are set out as follows:

In the assessment of this defence, the court should take into account the circumstances of the situation in which an accused relying on the defence found himself in. In this case, the court preferred the evidence of Hwinyai to that of the accused. Hwinyai's evidence accorded with

probabilities in that the accused would have had a motive or reason to be aggressive towards the deceased person if as according to his warned and cautioned statement, he had proceeded to the scene of the commission to look for Hwinya who had ransacked the house and was now staying with another man. The accused would most probably have been armed as per the evidence of Hwinya. The evidence of Hwinya was the most probable because she spoke to the accused having been aggressive from the moment of his arrival at the scene, evidence which was also consistent with that of Stella Charlotte Mutomera. Although the accused testified to having suffered injuries which he treated himself of he did not produce any evidence even of healed scars to support his evidence of suffering cuts on the hands back and buttocks as a result of tussling for the knife. The far, the evidence of Hwinya that it was the accused who attacked the deceased with the knife and not the other way round gets support.

The accused did not show that he was under an unlawful attack from which he could not extricate himself save by stabbing both deceased person. The accused was the aggressive party from the inception going by the evidence which the court has determined to be most probable, being the State witness evidence. I may well be that indeed at the center of the altercation was Hwinya whom the accused considered as his wife. This would not quite explain the attack on Kowo since Hwinya was in love with Chirume. This consideration should not cloud the real issue which arises. The *actus reus* was not in dispute. The issue arising was the availability of the defence of person. The court in such case does not take an armchairs approach but considers all the surrounding circumstances whilst placing itself in the position of the accused and determining whether the reasonable person would have acted the same manner that the accused did. The accused as accepted by the court was already armed when he got to the scene. His evidence that he wrenched the knife from Kowo was found to be untruthful. This was so because there was no evidence to show any injury upon himself as he claimed to have suffered. There was clearly no evidence led to show that the accused was justified to stab the two deceased in self defence. All the circumstantial facts pointed to the accused having arrived at the scene pre armed and intent on causing trouble which he did when he stabbed the two deceased in his act of aggression. The court determined that the accused attacked the deceased persons with the knife in circumstances where he foresaw the real risk or probability that his actions could result in serious injury or death but proceeded in his conduct despite the realization. The accused is found

guilty of the 2 counts of murder with constructive intent as defined in section 47 (1) (b) of the Criminal Law Codification and Reform Act.

SENTENCE

The accused stands convicted of 2 counts of murder committed with constructive intent. Accused's counsel submitted that the finding of constructive intent as opposed to actual interest reduced the accused's moral blameworthiness. To a point the submission has substance. In the case of *S v Ncube* SC 149/04 it is stated on page 3 of the cyclostyled judgment that a finding of constructive intent to kill may in addition to other factors constitute an extenuating circumstance. It follows therefore that a finding of constructive intent on its own does not reduce the accused's moral blameworthiness per se. where however it is coupled with other circumstances of mitigation then the cumulative effect thereof will ground substantial mitigation. Against the accused on this point is that he stabbed two persons resulted in their death. Two lives were lost and this constitutes aggravation of substantial proportion.

It was submitted by the accused's counsel that the accused has been in custody for more than 2 years awaiting trial. The state did not explain or justify its delay. Its explanation that the accused had another case pending did not justify the delay. That the murder investigation were complex did not justify the delay. There was nothing complex about the investigation as facts were straightforward. The accused has a constitutional right to a speedy trial within a reasonable period. A 2 year delay to bring the accused to trial without justification is prejudicial to the accused and a violation of his rights. The fact of delay will be accorded due consideration and is considered a mitigatory factor.

It was submitted that the murders were a crime of passion. Whilst this point would ordinarily provide weighty mitigation, the circumstances of each case should be considered. In *casu*, the court made a factual finding that there was no reliable or conclusive evidence led to show that the accused and Margret Hwinya were husband and wife. Therefore the issue of the murders being motivated by passion was not shown to be the case. Nonetheless it was the finding of the court that accused may well have had feelings towards Hwinya and hence his being pre-when he went to look for Hwinya. One does not arm oneself unless one anticipates trouble and the weapon is a defensive trial. If not, the weapon would be for use on the offensive. The accused was not on a peace mission when he went to the scene whatever the cause of his

emotions and it will be accepted that he harboured some emotions, this is very little impact on his mitigation.

Counsel also submitted that the accused acted in self-defence. This was not the finding of the court. The court dismissed the defence. That was the end of the matter. The defence having been wholly dismissed does not qualify for consideration as a mitigatory circumstances.

The State counsel submitted that the accused's moral blameworthiness was very high because the accused killed two persons. This is true. Counsel also submitted that the offences were pre-meditated. The accused was given the benefit here. The accused did not plan on killing the deceased persons. The finding of constructive intent implied that the accused engaged in conduct so inherently dangerous that death always looms by when one attacks another with a dangerous weapon like a knife or made of metal. The accused appears to have been spoiling for a fight. However, he did not pre-meditate or pre-plan to murder the deceased but perhaps he planned to fix the deceased and he went overboard.

The personal circumstances of the accused are ordinary. He is 32 years old and is not married. He has no assets. He had a different upbringing in which he lacked parental guidance. Evidence showed that he lived a life of scrounging around for sustenance and mixed with bad company as clearly demonstrated upon a consideration of the places he frequented and friends like Shine Jairosi whom he called to give evidence and was adjudged to be a dishonest witness.

The crime of murder is inherently evil and abhorrent. It is the only crime in regard to which the death penalty may be imposed in the discretion of the court if the murder is committed in aggravating circumstances. If the death penalty is not considered appropriate but a finding that the murder is committed in aggravating circumstances such as are listed in s 47 (2) or (3) of the Criminal Law (Codification and Reform) Act is made, the court is enjoined to sentence the accused to imprisonment subject to a minimum penalty of 20 years imprisonment. In *casu*, the crimes were committed in aggravating circumstances. The murder was one of two or more murders committed during the same episode. This amounts to an aggravating circumstance in terms of s 47 (2) (b) of the Criminal Law Codification and Reform Act. The court also considered that the accused used a knife to stab the two deceased and he used severe force. The deceased Kowo in count 1 died at the scene whilst the deceased Chirume in count 2 had his stomach ripped open and intestines protruded from the opening. The stab wounds perforated the

intestines. The accused person cannot escape the minimum sentence in each count. Society demands people who commit murder are dealt with severely.

In determining an appropriate sentence, the court considers not just the minimum sentence aforesaid, but the trial factors which are, the seriousness of the offence, the personal circumstances of the offender and interests of society. The court must also exercise mercy which is a concomitant of justice delivery. The sentences in this case must be individualized. If the individual sentence result in an unduly harsh or excessive sentence the court may consider palliating the sentence by ordering that they run concurrently or suspending part thereof where a suspension is permitted. In this case however a suspension of the sentence is not permitted by law. The sentence can however be ordered to run concurrently. The discretion to order sentence to run concurrently is a total used for exercising mercy and anchoring a lengthy cumulative sentence.

The accused will be sentenced as follows:

Count 1 30 years imprisonment

Count 2 30 years imprisonment

Total sentence 60 years imprisonment. The sentence in count 2 to run concurrently with the sentence in count 1. The effective sentence is 30 years imprisonment.