

THE STATE
versus
WALLEN MUPUNGA
and
MASIMBA MAKOTO

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 09 May 2022, 21 November 2023, 25 January 2024

Criminal Trial

Assessors: Mr Mhandu
Mrs Chitsiga

A Masamha, for the State
E Samundombe, for the 1st accused
B Taruvinga, for the 2nd accused

MUNGWARI J: The two accused, Wallen Mupunga (hereinafter first accused) and Masimba Makoto (hereinafter second accused) pleaded not guilty to a charge of the murder of Tinotenda Mandiyanike (hereinafter the deceased). With them vehemently denying any connection to the unfortunate demise of the deceased they initiated a lengthy process of a trial which took the court in and out of a trial within a trial, before finally returning to the main trial. The protracted trial endured for several months, causing a considerable strain on all the parties involved. The conclusion of the trial brought a palpable sense of relief to all the stakeholders and this herein are the reasons for the judgment.

The state's allegations are that on 22 May 2021 and at Sunway City, Ruwa, the accused persons unlawfully assaulted the deceased with a baton stick, electric cables, a wheel spanner, fists and booted feet all over the body realising that there was a real risk or possibility that their conduct may cause death but despite the risk continued to engage in that conduct and caused him mortal injuries.

In detail, prosecution alleged that the deceased was reportedly employed by the second accused to engage in the illicit trade of narcotics. On 22 May 2021, around midnight, the accused and an individual only known as Gaza who is still at large, confronted the

deceased and Stanley Kahari over the alleged disappearance of drugs, USD300 in cash and seven pairs of jeans. The accused forced the deceased to remove all clothing, bound his hands and legs, gagged his mouth and forced him lie on the ground. They physically assaulted him using electric cables, a baton stick, some car jumpers and even burned him with molten plastic. After that they bundled the deceased into the second accused's motor vehicle and drove to the deceased's residence to recover the money. A fervent search for the money at the deceased's house yielded nothing resulting in further assaults on the deceased. They ignored the pleas of the deceased's family members who had promised to reimburse them for any losses incurred. Instead, they took the deceased to an undisclosed destination. The accused persons were later seen assaulting the deceased inside the motor vehicle at Rockview. In a brazen display of bravado, they even brandished a wheel spanner to deter any public intervention before hastily departing from the scene. Unfortunately, the deceased succumbed to injuries from the assaults and upon this discovery the accused attempted to dispose of the body at Windsor 24 Hour clinic in Ruwa. Their plans to do so were foiled by the hospital personnel who directed them to ZRP Ruwa to file a report. This they did not do as they instead proceeded with the body to the Harare-Bulawayo road where they abandoned the deceased's body in an attempt to, make it appear as if the death resulted from a hit and run incident. Following investigations accused were subsequently arrested and the deceased's body recovered. An autopsy conducted on the remains of the deceased revealed multiple injuries and fractures on the body. The cause of death was from bi-parieto occipital subdural hematoma and severe head trauma.

First accused's defence outline

The accused stated that in April 2021, he lent his friend the second accused 100usd, with the understanding that it would be repaid within a week. However, the second accused failed to fulfil his side of the agreement and on 22 May 2021 the first accused went to the second accused's residence to inquire about the repayment. At that time, he found the second accused engaged in a dispute with the deceased. Present at the scene were Gaza and a person called Stanley Kahari (Stanley). The altercation revolved around a debt that the second accused claimed the deceased owed him. The second accused asked him for assistance to retrieve his money from the deceased claiming that this would enable him to pay him back his money. Eager to get his money back and unaware of the details surrounding the debt, the first accused agreed to accompany them to the deceased's residence. He claimed to have innocently taken a seat in the front of the car, while the deceased and Gaza sat in the back. As

they travelled to the deceased's house, he saw Gaza physically assaulting the deceased demanding the return of the second accused's money. Upon arrival he observed the second accused disembark and converse with the people present at the house. He neither heard nor witnessed any further details of the conversation. They returned to the second accused's house without obtaining what they were seeking. The first accused then left the deceased in the company of the second accused and Gaza and parted ways with them. He denied acting in common purpose with the second accused in a way which may have led to the demise of the deceased. Furthermore, he claims to have facilitated the arrest of the second accused in an attempt to clear his own name.

Second accused's defence outline

On the other hand, the second accused also denies assaulting the deceased and claims that it was actually Gaza who assaulted the deceased. He claimed that he had had to refrain Gaza from assaulting the deceased and encouraged them to resolve the matter amicably. After sometime, he had left the deceased in the company of Gaza and returned to his place of residence. He was surprised to learn that the police were searching for him in connection with these allegations. He voluntarily went to the CID Homicide department where he was formally charged with this offence. The accused denies voluntarily making any indications to the police asserting that it was the police officers who took him to Norton Hospital and pointed to him the deceased's body which was in the mortuary

State case

With the consent of the defence, the state opened its case by tendering the following exhibits:

1. A black baton stick admitted as exhibit 1. It is one of the alleged weapons that was used to fatally assault the deceased. It is an ominous looking weapon.
2. A silver cross wheel spanner was also tendered as exhibit 2, yet again another of the alleged murder weapons. Any forceful impact on the human body renders it a lethal weapon.
3. Exhibit 3 a blue Mercedes Benz C180 with Registration number ADI 7931 was tendered. It was put beyond question that the motor vehicle belongs to the second accused and on the fateful day he was driving it with the deceased inside as an unwilling passenger. The motor vehicle was allegedly used to ferry the deceased to his house and to further dump his body in Norton.

4. Next in line was the uncontentious admission of the post-mortem report which was sworn to by a pathologist called Dr Yoandry Olay Mayedo at Parirenyatwa Hospital on 7 September 2021. The pathologist noted numerous abrasions and limb fractures on the body of the deceased as well as internal haemorrhaging. The injuries were consistent with severe trauma. In his final analysis, he concluded that the death of the deceased was as a result of *biparieto occipital subdural hematoma* and consequently removed any doubt on the cause of the deceased's demise. The autopsy report was marked as Exhibit no 8 as in between various other exhibits were tendered but only after a trial within a trial. The exhibits will therefore be discussed in the trial within a trial that was conducted.

Beauty Godo (Beauty) and Lovemore Rwadza (Lovemore)

The evidence of these two witnesses was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as it appears in the state outline. The crux of Beauty's testimony was that she is employed at Windsor 24 Hours clinic, Ruwa. On 22 May 2021 at around 2pm she was at work when she saw one of the doctors rushing to attend to a patient in a motor vehicle that was parked behind the clinic. She followed the doctor and on her arrival at the motor vehicle, she heard the doctor directing that the patient should be taken to a government hospital. The motor vehicle, a blue Mercedes Benz, then drove out of the clinic premises.

Lovemore on the other hand is an attested member of the Zimbabwe Republic Police stationed at ZRP Norton traffic. On 22 May 2021 at around 2200 hours, he was on duty when he received a phone call from an unknown motorist reporting a hit and run accident at the 62-kilometre peg along Harare-Bulawayo road. In the company of other police officers, he attended the scene. On arrival, he found the body of the deceased lying on the edge of the road. The body had a broken left leg and bruises on the whole body. Detectives from CID Norton also attended the scene. To them it appeared as if the cause of death might have been a road accident. He and other police details conveyed the body to Norton Hospital mortuary.

In addition to this the state applied that the evidence of Stanley Kahari and Lovemore Nyamuzinga be expunged from the summary of evidence as they had failed to locate the two witnesses and this was done.

Other Evidence

The state also led oral evidence from four witnesses namely Vivienne Mandiyanike, Blessing Mamvura, Martin Mubeto and Tendai Machirori. We summarise their evidence below:

Vivian Mandiyanike (Vivian)

She is the sister of the deceased. She informed the court that her brother was an adult loafer who was not only a drug addict but a peddler too. She clarified that the second accused was in the business of selling crystal meth and that the deceased was his salesman. The deceased often spoke about the second accused at home, and would often times put up at his house. From this she concluded that they had a close relationship. She mentioned that prior to this day she had not met both accused. She only managed to put a face to the name when the second accused introduced himself to her on the morning of 22 May 2021.

Vivian stated that, the fateful day started like any other. She was in the kitchen when the second accused came to the door of the house and informed her that the deceased needed her at the car. She went to the car, a navy-blue Mercedes Benz (Exhibit 3), and inside saw the first accused, the second accused, and Gaza. She also noticed that the deceased was trapped inside the car and unable to get out due to the deliberate positioning of the first accused's passenger seat, which confined him with little room to move. Gaza was pressed closely against him. The witness observed the deceased constantly shifting his legs in an attempt to find a comfortable position to sit, but he was unsuccessful. It was clear to her that he was constrained.

The witness noted that the deceased was in a bad condition, with bruises on his knees and neck. His eyes were bloodshot and swollen, and his right eye was particularly affected, as he could hardly open it due to the swelling. The witness's suspicions that the deceased was being held against his will were strengthened when the deceased requested to get out of the car and look for his pair of shorts, which contained the money in question and the accused turned down his request. Instead, the second accused asked her to bring the shorts to the car so that the deceased could search for the money. She did not comply with the instruction but asked her aunt, Miriam Mangozho, to bring the shorts to the car.

The search for the money in the shorts by the deceased yielded nothing. This angered all three men in the car and the witness saw the first accused menacingly wielding a baton stick at the deceased. She also witnessed Gaza slapping the deceased twice on the cheeks. It

was evident to her that the second accused was in charge. He claimed ownership of the money and was the one who communicated with her, answering all the questions and explaining that they would not take the deceased to the police station as they wanted to thoroughly deal with him. No amount of begging and pleading for a chance to repay the money on behalf of the deceased could appease them. After failing to find anything, the trio drove off with the deceased to an unknown location.

Alarmed by the behaviour of the accused persons and the condition of the deceased, the witness informed her mother, who instructed her to find the deceased and ensure his safe return home. The witness and Miriam Mangozho made several attempts to locate the deceased at the second accused's place of residence but were unsuccessful. The accused later returned to her house and informed her that the deceased had escaped from their custody, and they did not know where he was. After numerous unsuccessful searches a police report was filed the following day. News of the police search for the deceased spread and reached the accused's ears. The witness claims to have been surprised by the anger which this news stirred up in the accused persons as they came back to the house and confronted her and Miriam once again, this time threatening her for reporting their visit to the police. The family persisted in their search until one day the witness spotted the first accused and facilitated his arrest on a charge of kidnapping. Approximately four months after the deceased's disappearance, Vivian received information from the police that the deceased had been found dead.

We were struck by the witnesses candour. She remained composed and steadfast in her testimony. The anguish she felt over the loss of her brother was evident to everyone present. The injuries sustained by the deceased and the suffering that she witnessed, where unfortunately her last recollection of him and she claimed that this picture now remained deeply ingrained in her mind. Her testimony was of utmost importance as she was the last person to see the accused alive, and in the company of the accused persons. This part of her evidence was corroborated by the admission of the accused persons attendance at her house in the company of the deceased, as well as the altercation over money that they had with them. Consequently, her testimony resonated with the accused's account to that extent and we have no reason to doubt her. We find her testimony credible.

Blessing Mamvura (Blessing)

The witness a medical doctor practicing at Windsor 24 Hour Clinic, Ruwa explained that he was summoned by a nurse aid for an emergency in the car park on 22 May 2021. Upon

approaching a Mercedes Benz, he noticed three masked adult males standing outside the vehicle. Due to their masks, he was unable to positively identify whether the two accused persons were among them. Inside the car, he observed an adult man lying in the back seat. Without delay, he followed all necessary health protocols to assess the condition of the unresponsive individual. He checked the airways, breathing and circulation and unfortunately discovered that there was no pulse and the individual was dead. He enquired from the three men what had happened to the deceased and one of the three men, who claimed to be the deceased's brother, informed him that he had been assaulted by a mob after stealing a cell phone. Blessing testified that the injuries he observed were consistent with those arising from an assault. Consequently, he advised the accused persons to go and report the incident to the police. He saw the accused drive out of the car park and assumed they were reacting to his advice.

Martin Mubeto (Martin)

The witness is a duly attested member of the Zimbabwe Republic Police stationed at Ruwa police station. On 23 May 2021 at around 3pm, he was on duty when Miriam Mangozho arrived at the station and filed a missing persons report with him. Through this witness a report received book was tendered with the consent of the defence as Exhibit 4. It detailed the nature of the report made. The witness informed the court that Miriam Mangozho provided an explanation of the circumstances surrounding the disappearance of the deceased and identified the second accused as one of those involved in the violent incident. Pursuant to the report he then attended at the second accused's house. He arrived at the residence and discovered that it is actually a den of drug addicts as the young men in attendance presented themselves like people under the influence of such narcotics. According to the witness the individuals were incoherent, and several fled upon seeing him. Present at the scene was Prosper Sabili, who was brave enough and less intoxicated than the others. He confirmed that the second accused was not at home.

A search of the premises led to the recovery of a black baton stick and blood-stained clothes which clothes he subsequently confirmed from the deceased's relatives as belonging to him. After three days of investigation, the witness handed over the report to CID Homicide for further investigation. The witness emphasized that the case had garnered attention within the police force due to its connection to drug peddling and narcotics.

Tendai Machirori:

The witness a member of the CID homicide with 17 years in service experience, informed the court that he was the investigating officer assigned to the case. At the time he took over the investigation, only the first accused had been arrested and charged with kidnapping. During the conduct of his duties he requested that the first accused be brought from prison using ZRP Form 86 so that he and three other members of his team could interview him. The first accused, so he said, freely and voluntarily provided a detailed account of how he, along with the second accused and Gaza, took the deceased in the hope of recovering the stolen money. During the interview the first accused mentioned that the victim of the kidnapping charge was no more. They then preferred murder charges against him and asked that he document his account, which he did in a warned and cautioned statement.

The witness explained further that the second accused was arrested in August of 2021, three months after the alleged murder. He had been evasive in the three months preceding his arrest. He was eventually handed over to them by his legal practitioner.

Through their investigations they managed to recover the remains of the deceased and all the exhibits used in the commission of the offence. According to the witness the accused persons voluntarily made indications soon after the interviews albeit at different times. Upon applying to tender the first accused's unconfirmed warned and cautioned statement Mr *Samundombe* for the first accused objected, stating that the statement as well as the indications were not made freely and voluntarily. While Mr *Taruvinga* for the second accused did not object to the tendering of the second accused warned and cautioned statement, he objected to the indications that the state witness claimed had been freely conducted by the second accused. The objections raised by counsels for the accused saw the state apply for a trial within a trial to be conducted which application was at this juncture granted.

Trial within a trial

The first accused reiterated in the trial within a trial that he did not make his warned and cautioned statement freely and that because of this it should not be admitted as evidence. He claimed that he was heavily assaulted underneath his legs, knees and on his arms by the police with a steel bar after which he was made to sign a warned and cautioned statement which had already been prepared by the police. He also denied making any indications to the police. The second accused on the other hand did not dispute the makings of his warned and cautioned statement which he said was done in the presence of his legal practitioner. He only challenged the indications which he said were not made freely and voluntarily because according to him four detectives took turns to assault him with open hands, an iron bar and

fists alleging that he is the one who killed the deceased. He was then informed that he was supposed to make some indications at the scene of crime whether he liked it or not. The following day he was then taken to the scene of crime along the Harare Bulawayo Road where he was shown a certain place where it was alleged the deceased's body had been picked. One of the detectives demonstrated how the accused was supposed to make indications. Out of fear of further assaults by the CID detectives he then made the said indications whilst he was being video recorded.

The state called two witnesses Tendai Machiriori and Luckson Saurowe to testify on the manner in which the recording of the statements and indications were done. Tendai Machiriori testified first and denied the accused's assertions on the impropriety of the conduct of the indications and the compilation of the first accused's warned and cautioned statement. Both counsels conducted a tepid and ineffective cross-examination of the witness resulting in his evidence remaining untainted. His evidence was crucial to the extent that he made it clear that both accused persons cooperated during investigations and they narrated what they did and also led to the recoveries of the exhibits. We found the witness credible. With Luckson Saurowe on the witness stand we viewed the video footage of the indications that were done by the two accused persons. The witness was thorough as he took us through the paces. We were convinced that the investigations carried out by this witness were professionally done in accordance with the law. Not surprisingly soon after the court had viewed the video footage and while Luckson Saurowe was still on the witness stand defence counsels for the accused waived their right to cross examine him and instead opted to address the court. They made concessions on the admissibility of the extra curial statements. Counsel for first accused stated that he had instructions from the accused to abandon his claim and to concede to the fact that he is the author of all the extra-curial statements and that he attended to them freely and voluntarily. He accepted that they be tendered as evidence and that they all be deemed admissible.

Counsel for second accused in turn also said the following "I will take the same position as first accused. After having sight of the video, I will abandon the argument that the indications were not made freely and voluntarily. The video of the indications are admissible as evidence as they were made freely and voluntarily". After the court satisfied itself on the veracity of these submissions from both accused, the trial came to an end and the court ruled that the unconfirmed extra-curial statements in particular, the first accused's warned and

cautioned statements and all the indications done by the two accused persons are admissible as evidence into court.

With the admissibility of the first and second accused's extra-curial statements disposed of, the main trial resumed and Tendai Machiriori continued with his testimony. He retold the events which took place during the accused's making of their warned and cautioned statement and indications. They became a part of the state's evidence in the main trial. Through this witness the state applied to produce the video footage of the indications, and the accused's warned and cautioned statement. They were admitted as Exhibits 4, 5, 6 and 7 respectively.

Defence case for first accused

Wallen Mupunga

He incorporated his defence outline into his evidence in chief and added detail. While he admitted having been in possession of the baton stick he told the court that it was because he had seized it from Gaza who wanted to assault the deceased with it. According to the accused, they had left the deceased's house and headed for the police station. On their way, the deceased attempted to jump out of the moving vehicle and Gaza grabbed him by the throat to save him. They proceeded to Sunway for recoveries but discovered that the deceased had lied to them. They passed through a tuck shop and bought food which they ate. They once again set out for the police station. According to the accused when they did so the deceased was alive and was even conversing. Shortly thereafter, Gaza then informed them that the deceased was no longer breathing. They then headed to 24hour clinic where the deceased was examined while he was sitting in the back seat of the car. The doctor advised them that in order to treat the deceased they needed to first make a police report. He confessed to the court that instead of doing as advised they panicked and decided to dump the body in Norton.

Under cross examination the accused's narrative was torn into shreds. He admitted that the second accused's money did not disappear the previous day as he wanted the court to believe. He also sought to correct himself by saying he was owed USD 75 for curtain rods by the second accused and not USD 100 as stated in his defence outline. He admitted that the three of them assaulted the deceased. Gaza with a baton stick while he and second accused used hands to assault him. He said the police forced him to lie that they used a wheel spanner and

electric cables to assault the deceased in his admitted statement. We were not swayed by this assertion as the accused himself had in the trial within a trial conceded that he was never forced and the court had ruled the statement admissible. That notwithstanding the accused admitted that the deceased died within an hour of the severe assaults. He admitted associating with the second accused and Gaza at large for the same purpose and admitted that they failed to take the deceased to the police. He conceded to having misrepresented facts in his defence outline.

Second accused-Masimba Makoto

This accused announced to the court that he wanted to tell the truth and depart from his defence outline. In his narrative of what he deemed to be the truth, he denied engaging with the deceased for purposes of selling drugs but instead claimed that he worked at his transport business. In essence he gave a similar narrative to the one given by the first accused in his defence evidence. He reduced his role and that of the second accused in the death of the deceased to mere slaps and attributed the fatal assaults to Gaza.

From all the evidence placed before the court, the following facts became common cause:

1. The first accused was initially charged with kidnapping the deceased after he was found to be one of the last persons in whose company the deceased was in.
2. The charge then graduated to murder when after some months the body of the deceased was recovered from a mortuary in Norton.
3. The first accused then implicated the second accused who for 3months after the disappearance of the deceased was being evasive.
4. That the deceased and the accused persons were well acquainted with each other. They engaged in different tasks together.
5. That there were transactions that did not go well between the accused persons and the deceased. Inevitably the parties had a fallout.
6. Arising out of the fall out, and acting in common purpose the accused severely assaulted the deceased. The assault resulted in his demise and the first and second accused decided to dump his body in Norton.
7. The deceased's body was found in Norton at the 62km peg along Harare – Bulawayo Road lying on the edge of the road.
8. Both accused freely and voluntarily made indications to the police

9. First accused freely and voluntarily provided the police with a detailed confession to the offence of kidnapping.
10. That the second accused's motor vehicle was recovered as the vehicle used to transport the deceased
11. A wheel spanner, and a baton stick were recovered.

Issues for determination

Mr *Masamha* for the state in closing submissions insisted that the two accused' persons intended to cause the death of the deceased and that their actions proved this fact. He implored the court to find them guilty of murder. On the other hand Mr *Samundombe* for the first accused, and Mr *Taruvinga* for the second accused in closing submissions insisted that while the accused's actions had caused the death of the deceased they never intended to kill him ,nor did they realise that their assaults might cause his death. They claimed to have been negligent in their conduct and implored the court to instead convict them of culpable homicide. The question which therefore remains for resolution is whether the first and second accused intended to cause the death of the deceased.

The law on murder

The offence of murder consists of the unlawful and intentional killing of another human being. Based on this definition, it is evident that the prosecution must establish that the accused had some form of desire for the victims death. Intention is typically assessed from two perspectives: actual and constructive.

Actual intention refers to a situation where the accused specifically intended for the deceased to die. In pursuit of this intention, the accused devise a plan or scheme to achieve their objective. In other words, the accused's motivation is the death of the victim. See the case of *The State v Yeukai Graham Mutero* HH 178/23.

On the other hand, constructive intention also known as legal or indirect intention, involves the accused's realisation that their conduct carries a real risk or possibility of causing death. Despite being aware of this risk, the accused continue with their actions. While the intention to kill is not explicitly communicated inferences can be drawn from admitted and proven facts and circumstances to suggest that the accused recognised the risk or possibility of causing death or grave harm through their conduct.

Application of the law to the facts

The starting point for the court is to acknowledge that evidence on record is clear that the two accused assaulted the deceased. They admitted so themselves but claimed they only did so with open hands albeit severely. The medical report in contrast details wounds that are consistent with a hectic attack where numerous blows were thrown at the deceased. The doctor indicated that he had multiple bone fractures on the right hip, left humerus bone, and left tibiofibular. In his examination, he found seven abrasions all over his body which include those on his back left thigh and foot as well as the wrists and hands as well as emulsion wounds. In the end the blows damaged the deceased's brain and he suffered severe head trauma as well as bi-parieto occipital subdural haematoma. The injuries which include bone fractures could not have been from the use of hands only. We are fortified in our contention by the first accused's warned and cautioned statement Exhibit 7 which details the use of an electric cable, a spanner and a baton stick as being the weapons used in assaulting the deceased. On the other hand, this piece of evidence implies that their choice of weapons was not opportunistic. In fact, the accused selected the weapons, left home with them to the extent that Vivien saw the baton stick being wielded by the first accused. The choice of these weapons clearly shows that the accused did not simply want to express their anger at the deceased for their money. At the very least they must have realised the existence of a real risk or possibility that use of such weapons on the deceased could kill or seriously injure him. They were unconcerned about the outcome. The conclusion is inevitable. They had the intention to kill. What this also proves is that the accused persons are not honest people as they were intent on minimizing the roles they played in assaulting the deceased.

In addition to this, the assaults on the accused began early in the morning at the second accused's residence. We reach this conclusion based on the evidence of the first accused that in the morning upon his arrival he saw Gaza already assaulting the deceased at the second accused's house. The deceased's sister Vivien Mandiyanike testified that that when the deceased was brought to the house by the accused persons for the first time, he already had swollen blood shot eyes, bruises on the neck and leg. According, to the first accused in his warned and cautioned statement the assault on the deceased only ceased at the point of death. From this evidence we make the finding that the assault on the deceased was severe continuous and over a protracted period. We hold the view that, where one continuously assaults someone viciously and for a prolonged period, his intention is clear that he intends to bring about the death of that person.

Furthermore, we have evidence suggesting that the motive for the assault was that the deceased mishandled the second accused's drugs and money. Vivien, the deceased's sister confirmed her brother's involvement with drugs and informed the court that he was selling a drug called crystal meth on behalf of the second accused. The police witness, Martin Mubeto testified that the second accused's house was a known drug den, where he had witnessed drug users loitering and fleeing upon his approach. On the other hand the second accused in his defence denied being involved in the drug trade and claimed that his only business with the deceased was in the transportation industry. He however omitted to give further details on the transport business. In the circumstances it is reasonable to conclude that in addition to the money the deceased had mishandled the second accused's illicit drugs as alleged by the state. This could explain why the second accused was extremely angry with the deceased and initiated the assaults early on at his house. They refused reimbursement from the deceased's family insisting that the deceased should repay them, likely because they knew the family could not reimburse them for crystal meth. It is clear that the issue went beyond money as the assaults continued and the accused openly stated that they would not involve the police but would handle the matter themselves. Their refusal to involve the police further supports this claim. They were not interested in disclosing the true nature of the issue to the authorities as they could be arrested in the process. The accused's claim of taking the deceased around Ruwa for recoveries for some jeans was just but a smokescreen. The deceased was harassed for illicit drugs and money and the accused were intent on recovering the items at all cost.

However, the most damning piece of evidence was the video footage of the indications. We viewed it and have no doubt as to how the accused killed the deceased and what their motive was. The accused explained how they did so in graphic detail. After they left the deceased's house, they detained him in the motor vehicle for over a long period as they continued to assault him with the mentioned weapons. They admitted so themselves in these confessions which we held to be admissible. Without these indications the police would not have known how the offence was committed and would not have recovered the murder weapons. Their intention to kill the deceased was made known to us through this chilling video footage.

Furthermore, by their own admission the accused did not report the murder to the authorities but instead dumped the body along the Harare –Bulawayo road. They claimed that they panicked when they realised that the deceased was dead. That cannot be not true. They were informed at the 24-hour clinic that the deceased was dead and directed to the police

station to report. They did not do so, but instead crafted an elaborate plan to conceal the death. After dumping the body they claimed that they set out for the prayer mountains to pray. When prayers ended it became business as usual for them until the first accused was spotted by Vivien and identified as one of the culprits. Such actions are not consistent with persons who panic arising out of a negligent assault. Persons in their panicked state would have been expected to hand themselves over to the police following the unintended loss of their friend. The accused were in no such state. They were able to live with the thought of the deceased body lying unclaimed elsewhere and then even have the temerity to go back to his family and threaten Vivien and Miriam and lie to them that the deceased had escaped to an unknown place. These actions show that they intended the outcome of death and even went further and attempted to conceal it.

Given the above, we hold that the accused intended the death of the deceased. They armed themselves with the mentioned weapons and assaulted him with them over a protracted period. They wanted to recover their illicit drugs and money at any cost and were not keen to involve the police in the illegal transactions. They loudly proclaimed that they would deal with him. They dealt with the deceased and caused his death. They thereafter concealed his death. In the very least the accused must have known that such action would bring about the death of the deceased. They however persisted in their actions. These were not negligent actions.

Disposition

In the end we have clearly demonstrated that the accused's account of events is undeniably false. The circumstances surrounding the assault, the inferences drawn from them, the choice of murder weapons, the injuries sustained by the deceased and the shortcomings in their evidence all collectively serve as evidence of the accused's intention to kill the deceased. When all these factors are taken into consideration, we are firmly convinced that the prosecution has successfully proven that the accused possessed the necessary *mens rea*. In the circumstances, we are convinced that the state managed to prove the accused' guilt beyond reasonable doubt. Both accused are accordingly found **guilty of murder as charged**.

SENTENCING JUDGEMENT

The effects of drug abuse continue to be felt at every strata of society. In Zimbabwe, the notion that someone could be murdered pursuant to a drug transaction gone awry used to be

confined to the movies. This trial rubbished that view and brought to the fore the upheavals which are being occasioned by the drug problems in this country.

The deceased was murdered in a brutal and sustained assault by the offenders after they discovered that he had not only cheated them of their narcotic commodity notoriously known by the name crystal meth but that he had also embezzled proceeds obtained from earlier sales. The drug peddlers Masimba Makoto, Wallen Mupunga and an accomplice who is a fugitive from justice and only known as Gaza killed the deceased. At their trial the two offenders pleaded not guilty but we convicted them after we accepted evidence adduced by the state as irrefutable.

The facts proven at trial were as follows: The deceased was employed by the offender Masimba Makoto (Masimba) as a 'salesman.' His responsibility was to sell the narcotics. On the fateful day, the deceased was confronted by Masimba who wanted an explanation regarding the disappearance of a consignment of drugs and other items. When the parties failed to reach an understanding the two offenders and Gaza decided to physically assault him using electric cables, a baton stick and a wheel spanner in an attempt to recover the stolen consignment. They detained the deceased whom, and throughout the fateful day, they conveyed from one location to another. In the process they continuously subjected him to physical assaults inside their motor vehicle. The deceased ultimately succumbed to the injuries sustained from the brutal assaults. The post mortem report revealed that the assaults were so severe that he had no chance of survival because he had suffered multiple bone fractures on his body. When it became apparent to the offenders that the deceased had died, they devised a plan to dispose of the body at Windsor 24 Hour Clinic in Ruwa. The plan was however abortive due to the vigilance of staff at the clinic who refused to admit the 'patient' after it became apparent to them that he was lifeless. Unperturbed, the offenders left the clinic and headed for the Harare-Bulawayo highway where they dumped the deceased's body along the road so that it could be run over by motorists and make it appear like he had died in a hit and run accident. It almost paid off. After dumping the deceased's body, the offenders returned to the deceased's family and deceived them into believing that he had run away. They even threatened the family when they discovered that the deceased's relatives had filed a missing person's report at the police station. All this was done in the offenders' bid to recover their mind- and mood-altering crystal meth.

In mitigation the 1st offender stated that he is twenty-seven years old. In his brief narrative of his personal circumstances, he stated that he is married and has one child. He

works as a welder but does not earn a meaningful income and therefore does not possess any significant assets. He claims to have a limited education although the specific level of education attained is not mentioned. This is his first encounter with the law. The 2nd offender also in a brief narrative highlighted that he is 37 years old, married and has two minor children. He operates a transport business and his family is entirely dependent on him. He owns the house in Damofalls where the major assaults on the deceased were carried out. He implored the court to consider that he is a first-time offender who upon realizing the deceased's condition took him to the hospital for medical attention.

S 47 (4) of the code provides that:

“(4) A person convicted of murder shall be liable—
(a) subject to ss 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years,
if the crime was committed in aggravating circumstances as provided in subsection (2) or (3);
or
(b) in any other case to imprisonment for any definite period.”

Undoubtedly therefore a court which has convicted an offender of murder must prioritize the determination of whether the murder was committed in aggravating conditions or not before considering any other factors. The circumstances that aggravate murder are outlined in s 47(2) and (3) of the Code as follows:

47 Murder

(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—

(a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—

(i) an act of insurgency, banditry, sabotage or terrorism; or

(ii) the rape or other sexual assault of the victim; or

(iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or

(iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives; or

(b) the murder was one of two or more murders committed by the accused during the same episode, or was one of a series of two or more murders committed by the accused over any period of time; or

(c) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim; or

(d) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to by-standers.

(3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that—

(a) the murder was premeditated; or

(b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled.

From the above mentioned it becomes clear that the aggravating factors include instances where the murder was perpetrated in the course of committing specified offences such as kidnapping or illegal detention or when the murder was preceded by the torture or mutilation of the victim among a number of others. It is important to note that the list of factors is not intended to be close ended. The court is allowed to consider additional factors that may have aggravated the murder on a case-by-case basis.

In this case both counsels for the offenders relied on s 47(2) of the Code in conceding that the murder was committed in aggravating circumstances. They admitted that the offenders kidnapped and physically tortured the deceased and urged the court to impose a sentence of 25 years imprisonment for each offender. Mr *Masamha* for the prosecution buttressed the point that the offence was indeed committed in aggravating circumstances. He explained that section 8 of SI 146 of 2023 Criminal Procedure (sentencing guidelines) Regulations 2023 (hereinafter the guidelines) outlines the aggravating factors in murder matters. His argument was that the offenders kidnapped the victim, assaulted him violently and engaged in other forms of dehumanizing the deceased. Further after the fatal assault the accused persons decided to dump the deceased's body by the road side in a bid to stage a hit and run road traffic accident. He added that both offenders did not observe the fundamental human interrogatories of respecting the dead. He concluded that it was therefore the prosecution's wish that the court imposes a sentence of thirty (30) years imprisonment.

In the court's assessment there is no denying that the offenders tortured the deceased before they killed him. The assaults on the deceased were unrestrained. They were protracted, savage and indiscriminate. The court's view in that regard is supported by their choice of weapons which included a baton stick, electric cables and a wheel spanner. They resulted in multiple limb fractures that the deceased sustained and which were outlined in the post mortem report. There is therefore no debate that the torture which preceded the murder constituted an aggravating circumstance. It is worsened by the use of various lethal weapons on the deceased's body.

In addition, and as already said, the list of aggravating factors stated in s 47(2) is not open ended. That list was supplemented by the aggravating factors which appear under the crime of murder in schedule 3 to the Guidelines. In that regard, the court notes that after committing the murder the offenders sought to conceal evidence when they decided to dump

the deceased's body at the roadside in Norton along the Harare – Bulawayo Road. Their hope was that the body would be mutilated after being run over by-passing cars. That in turn would not only make it appear like the deceased had died from a road traffic accident but would also make it impossible for any post mortem examination to be conclusive about the cause of death. They, in that process obstructed the course of justice. They therefore fit into the criteria described both in s 47 (2) and in the Guidelines.

In its discretion to consider all other factors that may aggravate a murder, the court takes cognisance of the ever-worsening drugs problem in the country. The scourge is spreading rapidly. It has taken hold of the country's youth and reduced those who partake into zombies, helpless and vulnerable individuals who cannot contribute anything to their families and the country except bringing social, health and financial problems. The challenge is worsened by those that traffic the hard drugs. The court therefore considers that it must be held to be an aggravating factor where the murder occurs in the course of the murderer(s) committing a drugs related offence or the dispute which led to the murder is drugs related. The offenders and likeminded individuals are not saviours when they employ desperate youths to peddle drugs on their behalf. They remain the murderers that they are. They destroy not only those that they take advantage of but entire future generations.

As already stated on their part the offenders admit that the murder was committed in aggravating circumstances. There is simply no way out of it. The proven facts chronicling the circumstances made it difficult for them to allege otherwise. The court commends counsel for both accused for those professional concessions. For the above reasons the court's conclusion is that this murder was indeed committed in aggravating circumstances. It was an exceptionally bad case of murder as described.

Once the court finds that the crime was committed in aggravating circumstances, its discretion in sentence is trained towards a choice from any of the three options in s 47(4). In order for the court to accurately determine which choice to take, it must resort to the general mitigation and aggravation as submitted by the counsels and the prosecutor. It is at this point that the court assesses the comparative significance of general mitigation and aggravation.

The defence counsels for the offenders did not present any additional mitigating factors beyond those already stated. The fact that the offenders took the deceased to the clinic for medical attention is a red herring. They did not take him there for treatment. Rather it was a ploy to dump him at the hands of the clinic staff because when they conveyed him to Windsor 24 Hour Clinic the deceased had already died. They even had the temerity to lie to

the hospital staff about the circumstances surrounding the injuries which led to the deceased's death. They were not contrite and didn't show any remorse. There is therefore nothing to diminish the impact of the aggravating circumstances and their moral turpitude except that they both stand as first offenders.

On the other hand, the prosecutor highlighted that there was no provocation by the deceased towards the offenders. We agree with that assertion. The entire transaction that led to the disagreement between the deceased and the offenders was steeped in illegality. It was a criminal transaction. The offenders must have known better that their business was illegal. They should have accepted their losses instead of killing the deceased. They didn't see reason and relentlessly pursued the deceased, got him and butchered him until he died at their hands. There is no way that the court can ever regard that as provocation. It would be akin to condoning drug peddling and trafficking. The prosecutor also expressed concern about how these courts have repeatedly emphasized the importance of preserving the sanctity of human life and resolving conflicts amicably, factors which the offenders paid scant heed of. He submitted a victim impact statement from Catherine Makara the mother of the deceased who stated that besides the trauma of losing her eldest child, the offenders showed no remorse for the murder. They neither offered any condolences or apologies nor did they contribute towards the funeral costs. She said her wish was to see the courts remove the offenders from society in order to effectively protect the vulnerable who could easily be targeted.

Admittedly both accused persons are first offenders however it is regrettable that they initiated their criminal enterprise from the deepest ends. They also showed no remorse and no compassion for their heinous actions. They were determined to evade justice at any cost including mutilating the deceased's body and raising spurious defences. Even at the end of the trial and upon being pronounced guilty, they stood stony faced without a shred of regret.

Against the above background, we firmly believe that the penalty of death might be too harsh in the circumstances of first offenders. Instead, the court would exercise its limited discretion by sending the offenders to prison for the longest possible period in the hope that it would meet the justice of this gruesome crime, give the deceased's relatives some measure of closure and pacify society for this irreparable wrong with the hope that it will be eternally protected from the animals that the offenders turned into. The two have long gone past the threshold of rehabilitation. A determinate term of imprisonment would not achieve any of the objectives outlined in the guidelines as they have shown no remorse and given their drug related habits, the possibility of them reoffending cannot be discounted.

It is for the above reasons that we direct that each of the offenders be and is hereby sentenced to **life imprisonment**

National Prosecuting Authority, the State's legal practitioners
Samundombe and partners, 1st accused's legal practitioners
Tafirei and company, 2nd accused's legal practitioners