

STATE
versus
CAIYULONG

HIGH COURT OF ZIMBABWE
MUREMBA J
GOKWE, 11; 13 & 18 September 2024

Criminal trial

Assessors: Mr. Chakvinga
Mrs Mawoneke

M Mugabe, for the State
V Mashaya and P Chitsa, for the accused

MUREMBA J: This matter was heard before us on the 11th and 13th of September 2024, and the judgment was promptly delivered *ex-tempore* on the 18th of September 2024. Following a request for written reasons, we now present a detailed account of the judgment. These are the written reasons sought.

[1] The accused faces three charges: murder, attempted murder, and assault, as defined under Sections 47(1); 47(1) as read with s 189; and s 89 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Criminal Law Code). It is alleged that on the 24th of May 2024 and at Stone Steel Mine, also known as Blue Mine, Zhombe, he unlawfully and with intent to kill or realising that there was a real risk or possibility that his conduct may cause death and continued to engage in that conduct despite the risk or possibility, shot Goni Goni on the thigh with a Noringo pistol thereby causing his death. Using the same pistol, the accused is alleged to have attempted to kill John Muchawaya Bera by shooting him once on the right knee and once on the left thigh. The accused is also alleged to have unlawfully struck Lovemore Mapfanya with a clenched fist once on the head intending to cause him harm or realising that there was a real risk or possibility that his conduct may cause harm and continued to engage in that conduct despite the risk or possibility.

[2] The accused pleaded not guilty to all the charges. In his defence, the accused did not dispute shooting the deceased in the murder charge and the complainant in the attempted murder charge. He claimed that his actions were in self-defence and in defence of his property. Regarding the assault charge, the accused stated that it was fabricated.

[3] It is common cause that the accused is a Chinese national residing in this country on the basis of a Temporary Employment Permit. He operates Stone Steel Mine, also referred to as Blue Mine, located in Zhombe, Kwekwe. This mine shares a boundary with Blackhand 10 Mine owned by Cornelius Shariwa. The State's evidence was to the effect that the deceased and the complainants in Counts 2 and 3 were employees of Blackhand 10 Mine. On the day of the incident, they had gone underground to erect a barricade at the intersection between the two mines, Stone Steel Mine and Blackhand 10 Mine. As the deceased, complainants and their workmates were working underground erecting the barricade, the accused entered his mine using his shaft and proceeded to the intersection between the two mines. A confrontation ensued between the accused and the Blackhand 10 Mine workers, during which the accused shot at them. Resultantly, he killed the deceased and injured the complainant in the second count, John Muchawaya Bera. The accused is also said to have struck another worker, Lovemore Mapfanya on the head resulting in the third charge of assault.

[4] In raising the defence of self-defence and defence of property, the accused stated in his defence outline that, prior to the incident, illegal gold panners had breached the underground workings between his mine and Blackhand 10 Mine. The accused, who knew Mr. Cornelius Shariwa as the owner of Blackhand 10 Mine, explained that these illegal gold panners had repeatedly stolen gold ore and mining equipment from his mine via the breached boundary. The accused said despite reporting these thefts to the police, the problem persisted. The police were not helpful.

[5] On the day in question, the accused claimed in his defence outline that he was informed by his security guard, Takesure Ndlovu that intruders had entered the mine. These intruders were reportedly armed with axes, machetes, hammers, and chisels, which they were using for illegal

mining activities. Takesure who had encountered the intruders underground refused to accompany the accused, as they had chased him and attempted to attack him.

[6] The accused stated that he entered the shaft alone, with a torch on his forehead and saw approximately eight individuals carrying sacks of gold ore from his mine through Blackhand 10 Mine's exit. All of them were armed with weapons, which included machetes, axes, hammers, and chisels. Upon seeing the accused, they ran toward him, threatening and shouting in a language he did not understand. The accused fired three warning shots into the roof of the mine to deter the attackers, but they continued charging at him. Fearing for his life and the safety of his property, he shot twice at the legs of the complainant in the attempted murder charge, who was carrying a metal weapon. This complainant retreated after being shot. The deceased, armed with an axe, continued advancing toward the accused with the intention to attack. The accused then fired at the deceased's leg, causing him to fall to the ground. The intruders subsequently pulled away the wounded complainant and exited through Blackhand 10 Mine's shaft.

[7] The accused stated that he checked on the deceased, who was still alive, and attempted to minimise bleeding by using a torn piece of a sack and his work suit to tie the injured leg. He called for assistance from his employees, who helped ferry the deceased out of the shaft. Unfortunately, the deceased passed away before medical help could be obtained. His body was laid on the ground awaiting the arrival of the police. The accused said he instructed his employee, Roy Taguma, to report the incident to the police. Upon their arrival, the police detained and charged him. He claimed that he had no intention of killing anyone, as evidenced by the injuries inflicted on the people he shot. The accused said he offered to show the police the weapons and sacks of gold ore left underground by the intruders, but the police declined his offer to go down the mine, even when he offered to provide protective clothing for access into the shaft.

[8] The defence of self-defence is governed by Sections 252 to 254 of the Criminal Law Codification and Reform Act. Section 252 defines "unlawful attack" as any unlawful conduct that endangers a person's life, bodily integrity, or freedom. This forms the foundation of self-defence, as the right to defend oneself or others. It arises when such an attack occurs or is imminent. Section 253 outlines the requirements that must be met for self-defence to serve as a complete defence to

a crime. For the accused to rely on this defence successfully, the following conditions must be satisfied. The unlawful attack must have already commenced or be imminent, or the accused must have reasonably believed that the attack was imminent- this ensures that self-defence is not used pre-emptively or in situations where there is no real threat; the accused's actions must have been necessary to avert the unlawful attack, and there must have been no other means to escape or prevent the attack. Alternatively, the accused must have reasonably believed that their conduct was necessary to avert the attack and that no alternative means were available; the means employed to avert the unlawful attack must be reasonable in the circumstances - this prevents the use of excessive or disproportionate force in self-defence; any harm or injury caused by the accused must have been inflicted on the attacker and not on innocent third parties. Additionally, the harm caused must not have been grossly disproportionate to the harm threatened by the unlawful attack. The law also recognizes the stress or fear the accused may have experienced during the attack, as these factors can affect judgment. The court considers the circumstances, knowledge, and capabilities of the accused when evaluating whether the requirements for self-defence have been met.

[9] Section 254 provides a partial defence to murder in cases where the accused was defending themselves or another person against an unlawful attack. If all the requirements for self-defence under Section 253 are met, except that the means used to avert the attack were unreasonable in the circumstances, the accused will be found guilty of culpable homicide instead of murder. This reflects the principle that while the accused may have had a legitimate reason to defend themselves, their actions were excessive or disproportionate in responding to the threat.

[10] In short, the defence of self-defence requires that the accused's actions be reasonable, necessary, proportionate, and directly aimed at preventing an imminent or ongoing unlawful attack. However, the defence has limitations: excessive force or harm disproportionate to the threat negates the complete defence and may lead to a conviction for culpable homicide instead. These provisions aim to balance the right to self-defence with the need to uphold the sanctity of human life.

[11] The defence of property, as provided for in Sections 256 to 259 of the Criminal Law Code, establishes circumstances under which a person may lawfully act to protect their own or another

person's property from an unlawful attack. Section 256 broadly defines "property" as any item of any description and any associated interest or right. An "unlawful attack" on property is interpreted as any unlawful conduct that endangers or infringes upon this property.

[12] In terms of section 257 of the Criminal Law Code for defence of property to serve as a complete defence to a crime, certain conditions must be met. The unlawful attack on the property must have commenced or be imminent, or the accused must reasonably believe that the attack was imminent; the accused's actions must have been necessary to avert the unlawful attack -if there were alternative measures to prevent the attack, the accused must reasonably believe that these alternatives were unavailable; the means employed by the accused to protect the property must be reasonable under the circumstances - excessive force or disproportionate actions are not permissible; any harm or injury inflicted must be limited to the attacker and not extend to innocent third parties; and the harm caused must not be grossly disproportionate to the threat posed by the unlawful attack. The law accounts for the stress, fear, or urgency of the situation that may influence the accused's judgment.

[13] Section 258 of the Criminal Law Code imposes strict limitations on the defence of property when the crime involves killing. The accused can only rely on this defence if he/she resorted to killing only after exhausting all other means of protecting the property; the property could not have been defended by any other means except by killing - killing was the only option; the property was of vital importance to the accused - this ensures that the defence cannot be invoked for trivial or insignificant property; and the accused reasonably believed that no adequate compensation would be provided for damage or destruction to the property caused by the attack.

[14] In terms of s 259 of the Criminal Law Code, if a person accused of murder acted in defence of property but used unreasonable means to avert the unlawful attack, the defence may partially apply. In such cases, the accused may be found guilty of culpable homicide instead of murder. This partial defence highlights the importance of proportionality and reasonableness in actions taken to protect property.

[15] The difference between sections 257 and 258 of the Criminal Law Code lies in the nature of the defence of property and the circumstances under which it can be applied. Section 257 is

broad in its application and can apply to crimes such as assault, attempted murder, or other offences where the accused claims to have acted in defence of property. However, it demands strict adherence to the principles of necessity, reasonableness, and proportionality. Section 258 recognizes the gravity of taking a life and sets a higher threshold for invoking the defence of property in cases of killing. Unlike Section 257, which deals with general crimes, Section 258 specifically addresses the unique implications of using lethal force in defence of property. Section 258 imposes stricter conditions due to the severity of taking a life, whereas Section 257's conditions are relatively less stringent. Section 258 places greater emphasis on the importance and value of the property being defended, requiring it to be of vital importance, while Section 257 does not impose such a requirement. In essence, while both sections govern the defence of property, section 258 is far narrower and more demanding, reflecting the serious legal implications of using lethal force.

[16] In view of what the defences of self-defence and defence of property entail, it is our considered view that these defences are not sustainable in the circumstances of the present case. Our reasons are detailed below.

[17] There is no evidence supporting the claim that the deceased and his colleagues were illegal gold miners who were stealing the accused's gold ore. The evidence led by the State consistently demonstrated that the deceased and the complainants were employees of Mr. Cornelius Shariwa, the accused's neighbour. This evidence remained unchallenged during the investigation of the case by the police and during the hearing of the case. Mr. Shariwa testified that the deceased and his colleagues were his employees and produced an employee register containing their names, surnames, and ID numbers. Although the defence questioned the register's authenticity, arguing that it lacked details such as employment dates and salaries and said that the register was not registered with the Ministry of Mines, Mr. Shariwa explained that there is no legal requirement for such registers to be furnished to the Ministry of Mines. He said the register served its intended purpose of being available for inspection during visits by Ministry of Mines officials. The defence failed to cite any specific law mandating the format of the register, the details to be included therein, and the need to register the employee records with the Ministry of Mines, leaving no grounds to dispute the validity of the register.

[18] Furthermore, even without the register, Mr. Shariwa's oral testimony was sufficient for the purpose of this trial to establish that the deceased and complainants were his employees. It is undisputed that Cornelius Shariwa is the owner of a neighbouring mine to the accused and that he had employees at the time material to this case. If the deceased and his colleagues were illegal gold panners intruding into the accused's mine through Mr Shariwa's mine, it is illogical that Mr. Shariwa would claim them as his employees. What benefit would he derive from making such a false claim? Notably, the accused himself acknowledged knowing Mr. Shariwa as his neighbour, with whom he shares a mining boundary. The accused did not present any evidence to show that Mr. Shariwa was not conducting mining activities or that he lacked employees. Given this, it is difficult to comprehend why the accused's employee, Takesure Ndlovu, concluded that the individuals he allegedly saw entering Mr. Shariwa's shaft were illegal gold panners rather than Mr. Shariwa's employees. During the trial, the court specifically asked the accused to explain this matter, but he failed to provide a satisfactory answer. His responses were unrelated to the question, further undermining his position. Additionally, it was established during trial that the deceased and his colleagues were with Komborerai Shariwa, Mr. Shariwa's son as they were working on the barricade underground. It is implausible to suggest that the son of the mine owner was an illegal gold panner.

[19] The accused stated in his defence outline that his security guard, Takesure Ndlovu, who was patrolling underground, informed him of the presence of armed intruders in his mine. According to the accused, these intruders were carrying axes, machetes, hammers, and chisels, and had even attempted to attack Takesure. However, Takesure was not called to testify. His testimony was crucial to clarify where exactly he saw the alleged intruders, what they were doing, how they tried to attack him, and how he escaped. The defence failed to call him as a witness or provide any explanation for this omission. This is not to say that the accused has a duty to prove his innocence or to prove his defences of self-defence and defence of property. The duty to prove the accused's guilt lies with the prosecution.¹ See also s 18 of the Criminal Law Code. The burden of proof rests entirely with the prosecution throughout the trial, and it does not shift to the accused. However,

¹ *State v Joseph Jekiseni* HH 429/23.

the evidential burden may fall on the accused if, at the conclusion of the prosecution's case, an explanation is required. While the prosecution must prove every essential element of the crime beyond a reasonable doubt, the accused may need to present evidence or an explanation if the prosecution's case establishes a presumption of guilt. Importantly, the accused is not required to prove his/her innocence but only to raise a reasonable doubt regarding the prosecution's claims. If the accused succeeds in doing so, he/she must be acquitted. This demonstrates a balance in criminal justice: the prosecution carries the primary responsibility for proving guilt, but the accused may be expected to respond when the evidence demands it.

[20] Instead of Takesure Ndlovu, the defence called Roy Taguma, who identified himself as the manager and head of security at the accused's mine. Roy testified that on the day of the incident, he conducted a patrol underground at the 35-metre level (Level One). He claimed to have seen three wet sacks resembling those used for gold ore. Looking down to the 50-metre level (Level Two), he observed illuminated torches and heard the sounds of hammers and chisels, indicative of mining activity. Panicked, he switched off his torch and instructed the hoist operator, Milton, to bring him to the surface. He then instructed Takesure to radio the accused about the intruders before leaving for the plant to charge his phone. While there, he received a radio call informing him of a mishap at the mine. Upon returning, he saw the deceased being brought out of the mine, already deceased. He learnt that the accused had shot people underground.

[21] Roy's testimony clearly introduced inconsistencies with the accused's defense outline. In the outline, the accused had claimed that Takesure, during his patrol, encountered the intruders, saw that they were armed with dangerous weapons, and was threatened by them. This, according to the accused, was the reason Takesure refused to accompany him underground. However, during the defence case, the accused altered his position, asserting that it was Roy who had observed the intruders. This shift indicates that the accused had not been truthful in his defence outline regarding Takesure's involvement in seeing the intruders. Roy's testimony further clarified the matter. He stated that upon exiting the mine and coming to the surface, he instructed Takesure to radio the accused about the intruders before heading to the plant to charge his phone. Roy's account unequivocally establishes that he, not Takesure, was the one who saw the intruders underground. It is evident from Roy's testimony that Takesure never ventured into the mine nor confronted the

intruders directly. This contradiction in the accused's account significantly undermines his credibility and casts doubt on the reliability of his defence. By presenting conflicting narratives regarding a critical aspect of the case, the accused's defence lacks coherence and believability. This renders the accused incredible as a witness. In *Ephias Chigova v State* 1992 (2) ZLR 206 at 213D - F KORSAH JA said:

“The complainant's credibility is not to be assessed on apparent conflicts between her *viva voce* testimony and a summary of the case prepared by someone else. The “defence outline”, however, is prepared at the behest of the accused and usually read over by, or to, him and then signed by him or on his behalf. A complainant cannot be discredited because of discrepancies between a summary of the State case and her testimony, in the same way as an accused who, having made categorical statements in his “defence outline”, testifies to something other than that which may tend to underscore the veracity or otherwise of the accused.”

[22] Furthermore, Roy admitted that he did not see the alleged intruders directly, as they were at Level Two while he remained at Level One. He stated that he only heard the sounds of mining activities and retreated out of fear, noting that the intruders neither saw nor threatened him. This contradicts the accused's claim that Takesure refused to go underground due to threats from armed intruders. As previously established, Takesure never went underground. These discrepancies cast significant doubt on the accused's account of the events that allegedly prompted him to go underground. It even raises questions about Roy Taguma's truthfulness regarding whether he was the one who went underground. There remains the possibility that the accused fabricated the story entirely. It cannot be ruled out that the accused went down the mine on his own initiative, perhaps on a routine patrol, and encountered the deceased and his colleagues. In such a scenario, the accused may have opened fire on the workers merely under the suspicion that they were intruders, without realizing they were employees of the neighbouring mine engaged in constructing a barricade at the intersection of the two tunnels.

[23] What is evident is that the accused went underground alone. He explained that he did not inform the police about the intruders before going down the mine because they had failed to respond to previous reports of intruders at his mine. He claimed that when he went down the mine, he intended to scare away the intruders, believing that his presence would make them flee. This explanation suggests that the accused relied heavily on his firearm and was prepared to confront the intruders, taking the law into his own hands if necessary.

[24] State witnesses Lovemore Mapfanya, John Muchawaya Bera, Kumborerai Shariwa, and Gonai Masundire testified that they had gone underground to erect a barricade at Level One between their tunnel and the accused's tunnel. The encroachment of the tunnels was not disputed by the accused, who acknowledged that there was no barricade underground. He claimed that unauthorized persons had breached the boundary and encroached over 10 meters into his mine from Mr Shariwa's side. Mr. Cornelius Shariwa corroborated the issue of encroachment, stating that he had noticed smoke from explosives coming from the accused's side. He testified that he had agreed with the accused's blasters on the need to erect a barricade and that he had then gone on to instruct his employees to do so. He further said that this is what his employees were doing on the day the accused shot them. He said he was phoned and informed of the incident when he was in Kwekwe town. He rushed to the mine and arrived at the same time with the police who had been reported to. That Mr Shariwa was phoned about the shooting incident corroborates his averment that the people who were shot by the accused were his employees and not intruders.

[25] We are satisfied that the deceased and his colleagues were engaged in erecting a barricade between the two tunnels. This conclusion is supported by the consistency of the State witnesses' testimonies on this issue, although there were minor discrepancies regarding when the work commenced. Some witnesses stated that the work began the previous day, while others claimed it started on the day of the shooting. Unfortunately, the State counsel did not see it necessary to seek explanations for these discrepancies, which the defence interpreted as indicative of fabrication by the State witnesses. However, we are not persuaded by the defence's argument because these people were not illegal miners, as they were employed by Cornelius Shariwa. If they were not erecting a barricade, they could have simply stated that they were mining in their tunnel, a claim that would have been difficult to challenge given their right to mine in their tunnel. Even if they were accused of stealing gold from the accused's side, they could still assert that they were mining in their tunnel, and this assertion would not have been easily disproved. The tools they carried were standard mining equipment. Their claim that they were erecting a barricade on the day in question, rather than mining, demonstrates their honesty. The discrepancies in the time the work

commenced can be attributed to the natural lapse of memory over time, which is common to human beings. This does not undermine the credibility of their account.

[26] When the accused encountered the deceased and his colleagues, they were at Level One (35 meters below the surface), where his tunnel and Mr Shariwa's tunnel had encroached. According to Roy Taguma, the accused's manager and head of security, the accused's mining activities at Level One had ceased a month prior due to the poor quality of the soil. The accused's mining operations had since moved to Level Two at 50 meters below the surface. No evidence was presented by the defence to show that the deceased and his colleagues were mining in the accused's tunnel at the time of the encounter. The accused himself admitted that he did not see them mining but claimed they were stealing gold ore because he saw sacks in the tunnel. However, he did not explain where the gold ore came from, particularly considering that he was no longer mining in Tunnel One, when the ore was mined, or why it was left exposed in a location accessible to thieves. This lack of explanation lends credibility to the testimony of the deceased's colleagues, who stated that the sacks contained waste material which they were using for the barricade construction.

[27] Regarding the encounter, the accused claimed that he saw about 8 artisanal miners with torches approximately 10 meters away from him. He stated that they began advancing toward him, armed with machetes, axes, shovels, hammers, and chisels, and carrying sacks of gold ore. He said sensing danger, he fired three warning shots into the roof of the tunnel when they were about six to seven meters away. Despite this, he alleged that they continued advancing, with the complainant in the attempted murder charge leading the group, wielding a long metal object, possibly a chisel. The accused stated that he shot this complainant in the leg, but he kept on advancing and he had to shoot him in the other leg. He said he later shot the deceased in the leg because he kept on advancing wielding an axe in a raised position ready to strike him. The deceased fell, and that is when the rest of the group fled and exited through Mr. Shariwa's shaft.

[28] We find the accused's account highly implausible. It is difficult to believe that persons armed with machetes, axes, shovels, hammers, and chisels would continue advancing toward a man armed with a gun after he had fired warning shots. The suggestion that they were advancing

with weapons raised to strike him is even less credible. When asked why he shot the complainant in the attempted murder charge twice, the accused claimed that this complainant continued advancing after being shot in one leg, necessitating a second shot. Similarly, he alleged that the deceased continued advancing while wielding an axe at the time his colleague was being shot. This account is unconvincing, as it defies logic and human behaviour. No reasonable person would act in the manner described by the accused. Human instinct generally prioritizes self-preservation, making it unlikely that the deceased and his colleagues would willingly risk their lives to attack someone armed with a gun. This aspect of the accused's account not only defies logic but also paints an unrealistic picture of the behaviour of the deceased and his colleagues. If the complainant in the attempted murder charge had already been wounded after the first shot, it is implausible that he would still attempt to advance aggressively, especially given the fear and pain that would accompany his injury. Similarly, the assertion that the deceased continued advancing with an axe while his colleague was being shot seems equally unconvincing. These details portray a sequence of events that lacks consistency with typical human responses in such circumstances.

[29] In contrast, the deceased's colleagues provided a coherent account of the incident, stating that they were working on the barricade (at the intersection of the accused's tunnel and their tunnel) when they heard gunfire and ran toward the exit shaft of their mine. They said they were all in a state of panic and confusion about what was going on. Instinct told them to flee. Some managed to climb up the shaft, while others were grounded at the exit, pushing and shoving to escape. They all gave detailed accounts of how the accused who followed them to the exit shaft, struck and shot at them while he was standing at the exit. The summary of their accounts is as follows. The accused arrived at the exit shaft, fired his gun upward, and struck Lovemore Mapfanya, who was among those pushing and shoving at the exit. He hit Lovemore on the head with a clenched fist, causing him to fall. Once Lovemore was out of the way, the accused grabbed John Muchawaya Bera's leg with one hand as he was climbing up the shaft and shot him twice—once in the thigh of one leg and once below the knee of the other leg. Despite being shot, John did not fall, as his colleagues ahead of him in the shaft held onto his upper body while he screamed for help, pulling him up until they reached the surface. The accused released John's legs after shooting him. No one witnessed exactly how or when the deceased was shot. Lovemore Mapfanya was the only one who noticed

that the deceased, who had been ahead of the others in climbing the shaft, had fallen to the ground. Lovemore observed this while trying to get up after being struck on the head by the accused.

[30] The deceased's colleagues made it clear that they never attempted to attack the accused who caught them unaware. They testified that they were working on the barricade when they heard gunfire and fled toward the exit shaft. They described a scene of panic, confusion, and an instinctive attempt to escape, rather than an orchestrated attack on the accused. Their testimonies which we find believable cast doubt on the accused's version of events. The discrepancies and implausibilities in the accused's account suggest that he fabricated or distorted the circumstances surrounding the attack. Instead of presenting a truthful and credible defence, his narrative appears designed to justify his actions, which were disproportionate and unjustifiable under the circumstances. This lack of truthfulness reinforces the conclusion that the accused was not acting in self-defence or defence of property, but rather attacked the deceased and his colleagues unlawfully. Below are detailed accounts of the testimonies of the deceased's colleagues.

[31] John Muchawaya Bera testified that he had been employed by Mr. Shariwa at Blackhand 10 Mine for only 16 days, starting on 10 May 2024. On the fateful day, 26 May 2024, at around 3 p.m., he and his colleagues—Goni Goni, Lovemore Mapfanya, Komborerai Shariwa, and Gonai Masundure went down the mine to construct a barricade at the intersection of their mine and the accused's mine. They carried tools: a shovel, chisel, hammer, and axe. While working on the barricade, John noticed the light of a torch approaching from the direction of the accused's mine through the tunnel they were closing. Shortly afterward, he heard gunfire aimed at the barricade. In a panic, everyone began running toward the exit shaft of their tunnel. John managed to climb up the shaft, but as he was ascending, the accused, who was below him, grabbed his right leg from behind with his left hand and shot him in the legs. John was shot below the knee on the shin of his right leg, where the bullet grazed him, leaving a large wound but not entering the leg. No bullet was found inside. He was also shot in the backside of his left leg, just below the knee, where the bullet lodged and was later surgically removed at the hospital. Throughout the ordeal, John said the accused never uttered a word to them. He only identified the accused when he was being shot, as he had not identified him prior to that moment. All he had seen prior was the torch light and

then soon after, heard the gunfire. John stated that he had no recollection of the deceased's location at the time he was shot and did not know how or when the deceased was shot. He only learnt of the deceased's death after being taken out of the mine. John recalled that Lovemore Mapfanya, the assault complainant, was below him in the shaft. When the accused grabbed and began shooting him, John cried out to his colleagues ahead of him, who helped pull him up by his upper body until they reached the surface. He remained hospitalized until 7 June 2024. John described the pain he experienced as indescribable. When he appeared in court on 11 September 2024, he was walking with the aid of crutches, and his right leg was still in plaster. He stated that he continued to feel pain but could no longer afford medication. John denied allegations that he and his colleagues were illegal miners stealing from the accused and asserted that they had not attempted to attack him. He explained that they were constructing a barricade using timber and sacks. The timber was stacked from the ground upward and nailed to the tunnel ends to prevent it from falling. Sacks filled with waste soil were placed against the timber to create a barricade, ensuring workers from either side could not cross into the other tunnel.

[32] Lovemore Mapfanya's testimony closely mirrored that of John Muchawaya Bera in all material respects. Lovemore, a 20-year-old, stated that he was employed at Mr. Shariwa's mine, and that Mr. Shariwa was his uncle, his mother's brother. He explained that while they were working on the barricade, he did not see the accused approach, as he was positioned at the back of the barricade. Instead, he heard the sound of gunfire from approximately two meters away, with the shot striking the barricade. This caused panic among the group, and they all ran toward the exit shaft, which was about three meters from the barricade. At the exit, chaos ensued as they pushed and shoved each other in an attempt to climb up the shaft. While some managed to ascend, Lovemore was unable to do so. The accused then approached the exit and began firing shots up the shaft. He struck Lovemore on the side of the head with a clenched fist, causing him to fall. As Lovemore tried to rise, he realized he had stepped on someone, who turned out to be the deceased. Lovemore did not witness when or how the deceased was shot but recalled that the deceased had been the first to climb up the shaft. Upon rising, Lovemore saw the accused holding John Muchawaya Bera's leg with one hand and shooting him with the other. Lovemore began crying and raised his hands in surrender. The accused stopped shooting John on his own. Those ahead of

John pulled him up until they reached the surface, and Lovemore eventually managed to climb up the shaft as well. He assisted in lifting John, who was unable to walk. Once out of the mine, Lovemore walked toward the accused's mine and, at a distance of 15 to 20 meters, saw the accused emerging with a bucket. The deceased's body was inside the bucket, positioned with the legs up and head down. The accused who was in the company of his employees removed the deceased from the bucket and threw him onto the ground near the gate of Mr. Shariwa's mine. Lovemore approached and observed that the deceased was lifeless. He retrieved a blanket from their mine and covered the deceased's body, noting that the deceased's leg had been bandaged with a blue cloth. Lovemore stated that when the accused shot at them, none of them had attempted to attack him. He denied allegations that they were armed with machetes or intended to harm the accused. He also had no recollection of how many shots the accused fired. Lovemore concluded that when the accused struck him on the head, it was likely to move him aside to create space for shooting up the shaft at those who had climbed. He firmly disputed claims that they were illegal gold miners.

[33] Komborerai Shariwa's testimony was consistent with that of Lovemore Mapfanya in all material respects. Like Lovemore, he did not see the accused approach; instead, he was alerted by the sound of gunfire. Chaos ensued as everyone fled in disarray, fearing for their lives. Upon reaching the exit shaft, Komborerai managed to climb up, continuing to hear the sounds of gunfire as he ascended, though he never saw the accused. He then heard John Muchawaya Bera, who was below him, crying for help. Komborerai reached down to assist and successfully helped pull John out of the shaft. Komborerai firmly denied that they were illegal gold miners, stating that they were employees of Blackhand 10 Mine. He identified Cornelius Shariwa, the mine owner, as his father. He also confirmed that he had known the accused as the owner of the neighbouring mine since 2018 or 2019, when the accused began working at his mine. Similarly, Gonai Masundire's testimony aligned with the accounts of the others in all significant aspects. While it is unnecessary to repeat the details, Gonai said that he had known the accused as the owner of the neighbouring mine for approximately five years.

[34] The accused's use of a firearm against fleeing people was not necessary, as there was no imminent attack requiring such extreme measures. Even if the accused had wrongly suspected that

the deceased and his colleagues were intruders, he could have removed himself from the situation or sought assistance, rather than resorting to lethal force since these people were now running away from him. Section 253(2) of the Criminal Law Code emphasizes the importance of considering the circumstances in which the accused acted, including stress, fear, or capabilities. In *casu* the accused's narrative is riddled with inconsistencies and implausibilities, such as contradictory statements about who saw the intruders and the behaviour of the deceased and his colleagues. These issues undermine the credibility of his claim of self-defence. In any case the accused could not have been afraid of the suspected intruders because he said that he decided to go down the mine and confront these people after he had been informed that they were armed. If this story is to be believed, clearly, he went down prepared to fight. The accused's defence therefore fails to satisfy the statutory requirements of self-defence as outlined in Section 253 of the Criminal Law Code. His actions were neither necessary nor reasonable, and the harm caused was disproportionate to the alleged threat. This lack of justification for his conduct renders his self-defence claim unsustainable.

[35] The defence of property does not suffice under Section 257 of the Criminal Law Codification and Reform Act, against the charges of attempted murder and assault as the requirements of the provision are not met. The accused claimed the deceased and his colleagues were stealing gold ore. However, the evidence shows they were fleeing at the time of the incident, rather than actively engaging in an unlawful attack on the accused's property. This lack of an imminent threat undermines the validity of the defence. Lethal force was not necessary. There were other means to address the alleged threat, such as seeking assistance or taking non-lethal measures. The use of a firearm against individuals who were fleeing, rather than posing an immediate danger to the property, demonstrates a lack of necessity and proportionality. Shooting and assaulting the complainants in counts 2 and 3 cannot be considered reasonable when they were running away and posed no direct, immediate danger. The response was excessive and disproportionate to the alleged threat to the property. While the accused claimed the stolen property was gold ore, the state's evidence is that the sacks that the accused saw contained waste material used for barricade construction. Additionally, even if the material was valuable, the use of lethal force cannot be justified unless the property was of vital importance and could not be protected by other means.

No evidence suggests that the property in question met such criteria. The law emphasizes exploring non-lethal alternatives to protect property. The accused failed to take less extreme measures, such as notifying law enforcement agents or employing reasonable deterrents. His immediate resort to shooting demonstrates disregard for the proportionality and necessity required under Section 257. The accused's actions were neither necessary nor reasonable, and the harm caused was grossly disproportionate to the alleged threat to the property. Consequently, the defence of property cannot suffice as a complete defence to the crimes of attempted murder and assault in this case.

[36] The defence of property is unsustainable for the accused against the murder charge in light of Section 258 because the strict requirements for invoking this defence are not met. Section 258 of the Criminal Law Code requires that the accused must have taken all possible alternative steps to protect the property before resorting to killing. In this case, there is no evidence to suggest that the accused tried other measures such as seeking police assistance or employing non-lethal means to protect his property. Instead, the accused acted with lethal force, making no reasonable attempt to resolve the matter peacefully. The testimony of the deceased's colleagues indicates they were fleeing at the time, which suggests there was no immediate threat that necessitated killing to protect the property. The use of lethal force was disproportionate and avoidable. For the defence of property to apply, the property in question must be of vital importance to the accused. While the accused claimed that gold ore was being stolen, the sacks observed by the accused were said to contain waste material by the deceased's colleagues, undermining the claim by the accused that valuable property was being threatened. It is not in dispute that all that the accused saw were sacks, but he never got to see the contents thereof. He thus acted on suspicion that what was inside was gold ore stolen from him. The accused's actions appear driven more by a desire to confront the persons he saw in the tunnel than by a genuine fear of irreparable loss. Consequently, the defence of property in this case is unsustainable.

[37] We observed notable shortcomings in the police investigations. The investigating officer, Memory Derembwe, testified that she attended the mines where the incident happened on 28 May 2024, accompanied by officials from the Ministry of Mines. However, they were unable to go underground to inspect the crime scene as the Ministry officials deemed it unsafe. Consequently,

no spent cartridges were recovered. The investigating officer could not independently determine the exact scene of the crime. The accused claimed the shooting occurred in his tunnel, while the deceased's colleagues asserted it happened at Mr. Shariwa's exit shaft. Furthermore, the investigating officer was unable to confirm whether there was a barricade at the point where the accused's tunnel intersected with Mr. Shariwa's tunnel. This lack of thorough investigation reflects poorly on the officer's performance. It is concerning that the Zimbabwe Republic Police failed to find a way to access the underground crime scene in a case involving a fatality and serious injuries. Given the gravity of the offences, the investigation demanded a higher degree of seriousness and commitment. It is disheartening that no significant efforts were made to address the challenges of accessing the scene. During the investigation, it was established that Blackhand 10 Mine was legally registered in the name of Cornelius Shariwa. The mine had a valid licence set to expire on 13 June 2024 and was operating legally with employees on-site. A record book containing the names of employees, including the deceased and the two complainants, was also available. It was produced as an exhibit through Mr Shariwa, the owner of the mine.

[38] Despite the shortcomings in police investigations, in that they failed to inspect the crime scene underground, we find the accused guilty of murder. The accused intentionally killed the deceased whom he shot as he was climbing up the shaft. The deceased was shot in the leg. According to the postmortem report, the deceased died from hypovolemic shock, a femoral artery laceration and a gunshot wound to the left thigh. This disproves the defence's argument that a leg wound cannot be fatal. Hypovolemic shock is a medical condition in which rapid fluid or blood loss results in multiple organ failure due to inadequate circulating volume.² The complainant in the attempted murder charge was shot twice in the legs. The medical affidavit states that he suffered a gunshot wound of the backside of the left thigh and multiple bruises on the right foreleg. A bullet was also removed surgically. The complainant could have died if he had been shot in the femoral artery. This artery is the major blood vessel supplying oxygen-rich blood to the lower body and it starts from the upper thigh, near the groin and runs down to the back of the knee.³ This shows that a leg wound, depending on its severity, can result in death.

² Medscape <https://emedicine.medscape.com> Accessed on 7 April 2025.

³ Femoral Artery: Location and Anatomy- Cleveland Clinic <https://my.clevelandclinic.org> Accessed on 7 April 2025.

[39] It does not matter that in *casu* the doctor said that moderate force was used to inflict the injuries, that there was no likelihood of permanent injury and that there was no potential danger to life when he examined the complainant about 1 ½ months later, on 12 July 2024. While the doctor's findings are relevant, they do not absolve the accused of guilt for attempted murder. The critical factor in determining guilt for attempted murder is the accused's intent at the time of the act, not the eventual outcome or the degree of harm inflicted. The accused deliberately shot the complainant twice in the legs, an act that demonstrates clear intent to cause serious harm. The fact that the injuries were later assessed as moderate does not negate the accused's initial intent to inflict harm that could have been fatal. The complainant was shot in the thigh, and the deceased in the same incident died from a femoral artery laceration caused by a gunshot wound to the thigh. This establishes that leg wounds can be fatal, depending on the circumstances. The complainant could have suffered similar fatal consequences if the femoral artery had been struck, making the accused's actions sufficiently grave to warrant an attempted murder charge and conviction.

[40] Besides, the doctor's examination occurred 1 ½ months after the incident, when the injuries had already begun to heal. While the injuries were deemed non-life-threatening at that point, this does not diminish the severity of the act at the time it was committed. Shooting someone twice in the legs, especially while they are fleeing, reflects a reckless disregard for human life. Even if the injuries did not result in permanent damage or immediate danger to life, the deliberate act of shooting demonstrates intent to cause harm, which satisfies the requirements for attempted murder. While the doctor's findings provide insight into the extent of the injuries, they do not undermine the legal basis for the charge of attempted murder. The accused's actions, intent, and the potential consequences of those actions are the determining factors in this case. As such, the charge and conviction of attempted murder in the second count suffices. The accused is therefore guilty of attempted murder for shooting the complainant in the second count in the legs. The accused is also guilty of assault for assaulting Lovemore Mapfanya on the head with a clenched fist.

Sentencing Judgment

[41] This case involves a murder committed under aggravating circumstances. The accused used a firearm, a lethal weapon, to shoot the deceased. Such a murder, as defined under Section 47(4) of the Criminal Law Code and in the sentencing guidelines in S.I 146/2023, is classified as having been committed in aggravating circumstances. The presumptive penalty as provided for in the sentencing guidelines is 20 years' imprisonment. The statutory penalty for such an offence ranges from a minimum of 20 years' imprisonment to a maximum of the death penalty. This means that the accused cannot be sentenced to less than 20 years of imprisonment.

[42] The aggravating circumstances in this case are particularly severe. The deceased was murdered in a mining shaft where he was present with five other individuals. The accused fired his weapon in the tunnel and up the shaft indiscriminately, creating a substantial risk of killing or seriously injuring the deceased's colleagues. The defence counsel's submission that the accused should be sentenced to less than 15 years' imprisonment is not supported by the law, specifically Sections 47(2), (3), and (4) of the Criminal Law Code, as well as the sentencing guidelines. If several aggravating factors are present in a matter, the court has the discretion to impose a term of imprisonment which is way above 20 years up to the death penalty.

[43] In this case, the offence of murder is further aggravated by the fact that the accused shot the deceased and his colleagues as they were fleeing for their lives. Even if it were accepted that the deceased and his colleagues were illegally panning for gold in the accused's mine, the accused had no right to shoot them while they were running away. The sanctity of human life must be upheld, and the accused's actions demonstrate a cold-blooded killing. The accused intentionally killed the deceased, and the deceased's father provided a victim impact statement indicating the profound trauma caused by his son's death. The father, who had expected his 23-year-old son to marry and provide him with grandchildren, was devastated by the unnatural and violent nature of his death. The deceased was also the breadwinner for his family, and his loss has left them facing significant financial and emotional challenges. The father has expressed a desire for the death penalty to be imposed, while the State has prayed for a sentence of 40 years' imprisonment.

[44] While there are significant aggravating factors in this case, the court has also considered the mitigatory factors in favour of the accused. The accused is a first offender, aged 56, married in China with two adult children. He has another family – a wife and a minor child in this country. The child is not yet of school-going age. During the trial, the accused expressed remorse, stating that he was sorry for the loss of human life. He also provided financial assistance of USD 3,000 to the deceased’s family after the death of the deceased. He also attempted to assist the deceased underground by tying his leg with pieces of cloth to stop the bleeding. In light of these mitigatory factors, the court will temper justice with mercy and will not impose the 40-year sentence requested by the State. Instead, the accused will be sentenced to 30 years’ imprisonment.

[45] In relation to the charge of attempted murder, the accused used a firearm to shoot the complainant twice in both legs, causing serious injuries. When he was shooting the complainant, he was actually holding his legs to make sure that he would not escape. Whist the doctor’s report states that there will not be permanent injury, we noted that the complainant was still walking with the aid of crutches when he came to court to testify. His right leg was still in plaster. The complainant was shot while running away, and the victim impact statement reveals the profound pain and trauma he has endured. He lost a workmate during the shooting and remains deeply affected by the incident. He is still nursing his injuries and is unable to provide for his family as the breadwinner. The complainant has no hope of returning to the mining industry due to his inability to perform heavy duties. He now fears for his family’s future. This is an attempted murder offence which was committed in aggravating circumstances. The statutory penalty for attempted murder committed in aggravating circumstances is 20 years’ imprisonment up to death. The presumptive penalty for attempted murder committed under such circumstances is five years’ imprisonment, but given the severity of the offence, a higher penalty is warranted. The accused exhibited a high degree of cruelty by holding the complainant with one hand while shooting him in the back of his legs, completely disabling him from walking. The court agrees with the State’s submission for a sentence of 10 years’ imprisonment. However, to avoid an excessive overall sentence, five years of this sentence will be suspended for five years on the condition that the accused does not commit an offence involving violence on the person of another during this period.

The effective sentence for attempted murder will be five years' imprisonment, which we will order to run concurrently with the sentence for murder.

[46] Regarding the charge of assault, the accused used his clenched fist to assault the complainant on the head. Although the complainant was not physically injured or medically examined, he was psychologically affected by the assault, which occurred while the accused was firing gunshots at his colleagues. The complainant witnessed that the deceased was shot and fell into a state of shock and fear. He remains traumatized by the incident and requires professional counselling to address the psychological impact. The complainant is now afraid to return to the mining industry and is currently unemployed, despite being the breadwinner for his family before the incident. The statutory penalty for assault is level 14 fine / 10 years' imprisonment. We take note that the accused used a clenched fist instead of a weapon in assaulting the complainant. The complainant did not sustain any physical injuries. The presumptive penalty for an assault committed in such circumstances is a level 4 fine. A fine is therefore appropriate for this charge, and the accused will be sentenced to pay USD 100 in default of payment one month's imprisonment.

[47] In the result, it is ordered that:

(i) The accused is found guilty of all the three counts: count 1- murder; count 2- attempted murder and count 3 - assault.

(ii) The accused is sentenced as follows:

Count 1 - 30 years' imprisonment.

Count 2 - 10 years' imprisonment of which 5 years' imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence involving violence on the person of another and for which upon conviction he is sentenced to imprisonment without the option of a fine. Effective sentence - 5 years' imprisonment. This effective sentence of 5 years' imprisonment shall run concurrently with the sentence for murder in count 1.

Count 3 - USD 100 in default of payment 1month's imprisonment.

National Prosecuting Authority, the State's legal practitioners
Chitsa & Masvaya Law Chambers, the accused's legal practitioners