STATE

versus

JOSEPH CHANI

HIGH COURT OF ZIMBABWE

MWAYERA J.

ASSISTED BY CHAGONDA & CHIDAWANYIKA, ASSESSORS.

MUTARE TRIAL, 7 July 2012

**CHARGE : MURDER**

Ms. *J. R. Matsikidze*, for the State

Mr. *T. Thondhlanga*, for the defence

**JUDGEMENT**

**MWAYERA J**. The accused pleaded not guilty to firstly a charge of murder as defined in section 47 of the Criminal Codification Reform Act in which it is alleged that on the 23rd of September 2011 at Chiadzwa Diamond Base, Marange, the accused with intent to kill or realizing that there was real risk or possibility that death may occur assaulted Tsorosai Kusena with several sticks all over his body thereby inflicting injuries from which the said Tsorosai Kusena died. Secondly, the accused pleaded not guilty to three charges of assault, as defined in section 89 of the Criminal Law Codification Reform Act [Cap 9.23] in which it is the State’s contention that on the 23rd of September 2011 at Chiadzwa base Marange, the accused unlawfully with intent to cause bodily harm or realizing the real risk or possibility that bodily harm may result assaulted the person of Onesai Kusena, Pikirai Kusena and John Gwite respectively. Intending to cause bodily harm and realising that there was real possibility that bodily harm may result.

The brief facts of the State case are that at the relevant time the accused person, a chief superintendent in the Zimbabwe Republic Police was on duty at Chiadzwa on operation Hakudzokwi phase 15. He was the second in command and that on the 23rd of September 2011, the now deceased Tsorosai Kusena and the complainants namely Onesai Kusena, Pikirai Kusena and John Gwite were handed over by Mbada Diamond security guards to the police diamond base. This was following suspicion that the four were illegally panning diamonds. The suspects were detained in a holding cell at Chiadzwa diamond base and later during the day they were assigned to chop firewood. The suspects took opportunity to escape from lawful custody when they were being escorted back to the holding cell. Following which pursuit by the police of the escapees was effected and the escapees were arrested.

The deceased and Pikirai Kusena were the first to be re-apprehended when they fled from the base for a distance of about 3 kilometers. It is the State’s contention that upon re-arrest the two were assaulted severely by accused all over the body and they were further assaulted at the diamond base by the accused in the holding cell and that the blows were directed on their backs, buttocks and under the feet. The first complainant Onesai Kusena and the 3rd complainant John Gwite were later re-arrested and submitted to assault by the accused person in the holding cell resulting in them sustaining injuries just like the first pair arrested. The deceased Tsorosai Kusena latter passed on with cause of death being given as traumatic shock, secondary to assault. Onesai Kusena sustained serious injuries and so did Pikirai Kusena although for Pikirai, there was no potential danger to life and John Gwite also had serious injuries although there was no potential danger to life.

The accused’s defence outline was basically that he was deployed to Chiadzwa on operation Hakudzokwi phase 15. He had under his command around 1500 men from the police and army inclusive. On the 23rd of September 2011 the deceased and the three complainants were arrested by Mbada Diamond’s guards and brought to the diamond base where they were detained. The deceased and the three complainants escaped from police custody following which the police officers who included one constable Bhobho re-arrested them after giving chase for about 5 kilometers. The accused further stated he drove to intercept the escapees and observed constable Bhobho struggling with the two Tsorosai Kusena, now deceased and Pikirai Kusena. The accused then sent two police officers to go and help constable Bhobho in re-arresting the escapees and it was discovered that the deceased had fallen head long in the hills when he had escaped and when police were pursuing him. As a result of the fall he sustained injuries.

According to the accused, it was as a result of these injuries that Pikirai Kusena decided to stop to assist his brother who was now in agony. The accused further pointed out that the deceased was taken to the road where accused was and he could not stand upright. The accused then took the two to the diamond base where they were detained in the holding cell whilst he the accused went back to search for the other escapees who were still outstanding. These were however, later arrested by assistant commissioner Muzeza and brought to the holding cell. The accused in his defence outline told the court that later at night the deceased started vomiting and having diarrhoea and eventually died in the cells.

According to the accused, Pikirai Kusena told him that the deceased had fallen and hit on the rocks in the hills and that there had earlier been subjected to assault by Mbada security guards when they were arrested. Further that, they had been ordered to assault each other. The accused denied having assaulted the deceased and the complainants in any manner and he pointed out that if death was due to assault then it was assault at the hands of the Mbada Diamond security guards and that most likely the injury sustained by the deceased when he fell in the hills fleeing from the police custody had a bearing on his death. He also in his defence stated that the allegations were contrived more particularly that he was a chief superintend in the police and second in command. He could not have assaulted the deceased and complainants without assigning his juniors to do so if the need had arisen.

The State adduced evidence from 13 witnesses and accused in turn gave evidence in his defence case and also adduced evidence from one defence witness. Onesai Kusena the first State witness recounted how they were picked by the Mbada security guards and were ordered to team up and assault each other by slapping each five times in the face. The witness and deceased being blood brothers found it difficult to comply with the orders following which the other two that is Pikirai Kusena and John Gwite after assaulting each other than slapped the witness and the deceased in the face. Onesai Kusena told the court that thereafter, they were ferried to the diamond field and handed over to the police. At the diamond base according to the witness they were ordered to crawl to the holding cell which was about 150 to 200 meters away. The witness described the ground on which they were ordered to crawl on this hardly rocky surface. As a result of the crawling the witness and his colleagues sustained injuries on the knee caps, in the form of cuts and bruises. The witness told the court of how they took opportunity to escape after they had been given a task to chop firewood. When they had completed the task and were being escorted back to the holding cell they decided to escape.

According to the witness, they ran in different directions and he and John Gwite were the second to be re-arrested after having gone for about 20 to 30 kilometers and were almost nearing the village when they were taken back to the base, whereupon they realized that the deceased Tsorosai and Pikirai had already been re-arrested and locked up in the cell. The witness told the court that upon being re-detained, he noticed the deceased and Pikirai Kusena were sprawling on the floor because of pain. According to the witness, upon their re-arrest they were not subjected to any assault by the officers who brought them back when they had covered the distance of 20 to 30 kilometers away. They were not tortured in any manner but they were just taken back to the diamond base and locked up in the cell. In the cells were Pikirai and deceased were lying on the floor in pain they were warned by their colleagues of imminent assaults from an officer.

The witness told the court that indeed the accused came holding sticks and used one of them to assault the witness John Gwite and Pikirai, Onesai and another suspect who had been locked up with them. He told the court that the accused would order them to put their heads on the ground and raise their buttocks or butts as he alternated from one suspect to the other assaulting, including assaulting Pikirai and Tsorosai who because of pain could no longer comply with the deceased’s orders to raise his bottom for purposes of the assault. The assault only stopped according to the witness after one assistant inspector Mandizvidza came to the holding cell and took the stick away from the accused and threw it in the fire which was being used to warm the cell. The witness told the court that at night, the deceased complained of diarrhoea and soiled himself. He was groaning in pain and talking mentioning that he would die that day. The witness latter fell asleep.

The witness was only awakened from their sleep by a police man who was guarding the cell as well as a soldier who was guarding the cell and shown the deceased who had passed on. The witness maintained his evidence as given in the summary of the State. He was medically examined and serious injuries as detected by doctor on exhibit 2, were observed on his buttocks as there was hyper pigmentation of skin and signs of inflammation according to the doctor’s observations. The doctor’s observation at this stage it is relevant to mention in relation to the witness was that the injuries were caused by blunt trauma and there was potential danger to life as they were likely to cause kidney damage.

The second witness Pikirai Kusena confirmed they were arrested by Mbada security guards and that they were caused to slap each other five times. He also confirmed that deceased and the deceased’s blood brother refused to slap each other. He narrated how they were taken to the diamond base and ordered to crawl to the holding cell by the police whereupon they sustained injuries on their knees although their trousers were not torn in the process of crawling. The witness just like Onesai stated that after chopping the firewood, they took opportunity to escape from the officers escorting them back to the holding cell. He ran in the same direction with the deceased while they were being pursued and they ran for about 3 to 4 kilometers when the deceased got tired and sat down. He also stopped at that stage and was bitten by a dog and then they were re-apprehended and taken to the motor vehicle which was by the road side. The witness told the court that upon re-arrest there were subjected to assault by the accused and he did not mention that any of the other officers who re-arrested them subjected them to assault. They were driven back to the diamond base by the accused after they had boarded the vehicle. Again at the holding cells according to the witness they were ordered to put their heads on the ground and lift their bottom so as to enable the accused to inflict assault on them.

The witness told the court that they were severely assaulted and accused was using a stick to assault them. When Onesai and John came they found them lying on the floor groaning in pain and complaining of pain. According to the witness at that stage, the accused again came to the cells armed with sticks and he used one of them to alternatively assault the inmates. The deceased was no longer able to comply and he would just be assaulted whilst lying down. The witness also told the court that he ended being dizzy and was in pain such that he stopped paying attention to the details of what was happening around him in the cells. He recounted that the assaults only stopped when one police officer Mandizvidza came and disarmed the accused of the stick which he was using to assault and he threw the same into the fire. The witness corroborated Onesai Kusena’s evidence on material respects vis-à-vis the assaults, the arrival at the police base, their arrest by the Mbada diamond guards and the re-arrest after fleeing. But, we must comment he was an excited witness like a small boy.

Pikirai Kusena was also examined by a doctor and injuries were observed on him, on more or less the same positions as injuries on the other complainants as well as the deceased on the lower back and on the buttocks. The injuries per exhibit 3, compiled by a doctor where given as serious injuries and there was no potential danger to life.

John Gwite the 3rd State witness confirmed the evidence of the 1st and 2nd witnesses on all material respects. He recounted arrest by Mbada diamond security guards and being ordered to slap each other by so called “Wanyepa” Mr. Dryers. He also confirmed they crawled to the cells at the diamond base and that after chopping wood they decided to flee from the police custody. After his re-arrest when he was in the company of the first witness Onesai, they were not subjected to any torture or assault in any manner by the security forces inclusive of the police and the army but upon being lodged in the cells, the accused came and assaulted them using a stick. He recounted the same method of being ordered to put the head on the ground and raise the bottom to facilitate assault by the accused.

The witness also told the court that the accused alternated to assault each and every suspect in the cell and this included the deceased who was lying helplessly and unable to comply with accused’s instruction. He was lying flat but he was subjected to assault by the accused according to the witness. The witness pointed out that the assaults, they were subjected to by the accused were severe assaults and they were only rescued by arrival of one officer Mandizvidza who restrained the accused by taking the stick he was using and throwing it in the fire. Later in the night, according to the witness deceased requested to be assisted to relieve himself for he was no longer able to stand on his own. He was assisted and he later passed on. Just like the first two witnesses he pointed out that they sustained injuries as a result of the assault by the accused on their backs and buttocks and also as a result of being ordered to crawl to the cells by members of the police they sustained injuries on their knees.

The 3rd complainant, John Gwite was equally medically examined by a doctor and exhibit 4, medical report was compiled. The medical report showed that the complainant had sustained serious injuries and injuries were also observed on the buttocks and the lower back. The witness as a person in testifying maintained that no other security forces or officers subjected him or his colleagues during his presence to assault, and that the Mbada security guards at no stage assaulted them but ordered them and this was from one “Wanyepa” Mr Dryers who ordered them to slap each other five times in the face. He was firm that the assault perpetrated by the accused was severe assault and that accused used one stick to rotate in assaulting all the in mates.

The 4th State witness, Sensor Muthuli told the court that he took over the deceased and the three complaints from Mbada diamond security guards when all the suspects were brought to the Chiadzwa diamond base. According to the police officer a constable in the Zimbabwe Republic Police the suspects were fit when they were handed over to him by the Mbada security guards and he did not detect any abnormalities on them. He then caused them to crawl to the holding cell after having given them lunch, he handed the suspects and deceased to another officer so that he could take back the utensils to the kitchen and the suspects were requested to chop firewood following which they escaped on being taken back to the holding cells. The witness told the court that upon their re-arrest the first two, that is the deceased and Pikirai Kusena were the first to arrive at the diamond base in the company of accused and in the vehicle being driven by the accused. He told the court that he observed the accused, order the suspects to bend down with their heads touching the ground for him to assault their backs, lower back and buttocks following which he was ordered to take the suspects into the cell and guard them.

While in the cell, the accused again, came and perpetrated assaults in the same manner that he had subjected them to assault whilst outside at the diamond base. The witness told the court that accused had some special sticks which he kept at the base and he used one of those sticks to assault the two. He briefly went away, the accused then came back when the first witness Onesai and the 3rd witness John Gwite had been re-arrested and lodged in the cell. The witness told the court that the deceased and complainants and another inmate were severely assaulted by the accused who moved from one to the other in the cell assaulting them and only stopped the assault upon being disarmed by one officer Mandizvidza who took the stick which was being used by the accused and threw it in the fire.

The witness made it clear he could not do anything to stop the assault on the suspects, the complainants and the deceased because he was just a mere constable compared to the accused who was a chief superintend in the police office. He could not question the accused in any manner. The witness evidence was as per the summary of the State case which was presented. He displayed immaturity which was in line and akin with his age and experience in the force as observed by the courts. He was candid with the court that he ordered the suspects to crawl for a distance of about 100 to 200 meters to the cells because he believed that was a security measure. He was fairly new in the force. He also told the court that the trousers of the suspects were not torn and as such he concluded they were not injured without necessarily requesting to open up their trousers or checking if they were alright. Despite his being young, there is nothing to criticize about the manner in which the witness testified. He had no secrets. He just laid bare what transpired at the diamond base.

Following Muthuli was Philemon Manatsa, as a State witness, a corporal in the Zimbabwe National Army again equivalent to the rank of a constable in the police. He assumed duty at 1800 hours. He was manning the holding cells on the day in question with police details. He observed five men in the cells including the deceased and the complainants and the accused was subjecting all the inmates to assaults taking turns from one to the other using a stick. He stated that the other two could no longer follow the orders of putting their heads to the ground and raising their bottom but the accused did not stop assaulting them whilst they were lying flat on the floor. According to the member of the Zimbabwe National Army, the witness Manatsa, the blows were directed to a point just above the buttocks on the buttocks, at the back and were severe blows. Just like the other State witness, who testified shortly before him, he mentioned that accused used to have sticks which according to him he thought those were his button sticks. Which measured about a meter long and had a diameter of between three and four centimeters at the base.

The witness observed the assault for about an hour and it only stopped after intervention of inspector Mandizvidza who took the stick and through it in the fire. The now deceased, according to the witness was groaning in pain and predicting that he was going to die that day. He had to be helped to relieve himself and the witness told the court that at one stage he at night helped the deceased whilst being assisted by Onesai the brother so that the deceased could relieve himself and he pointed out that the later defecated and it was not huge amount of stool such that it prompted him to question why he was causing problems to be carried out for purposes of relieving himself. He also told the court that he observed that the deceased at some stage at night vomited. Later, he decided to check on the deceased who was no longer making noise as he had been previously making noise groaning in pain and he realized or observed that the deceased had passed on.

The witness also told the court while the deceased was lying on the floor groaning in pain at some stage he vomited. He observed injuries on the deceased, on his back, on the knees, on the feet soles, on the buttocks and he observed some injuries on the complainants which were of similar nature and at similar positions. The witness gave his evidence in a straightforward manner. He was manning the holding cell together with the police details. He also pointed out that he was too junior to question a person of the ranks of the likes of the accused, so, he could not do anything to stop accused perpetrating assaults but maintained that the accused severely assaulted the inmates with a wooden stick which he used to move around with at the base. To this extent the army details evidence tallied with the police details evidence that accused had made specials sticks and that he only used one of them on the fateful day. After realizing deceased had passed on he sent the police detail to go and notify the accused as command about the death but no one from the police came back so, he decided to go and report to his army superiors or bosses. The witness impressed the court as a candid man.

The 6th State witness, Edison Mandizvidza an assistant inspector with ZRP was part of the security forces on operation Hakudzokwi phase 15. On the fateful day, he came from Zengeni shops and saw a lot of security officers or forces gathered at the holding cells. His attention was drawn to the cells and he observed five inmates all lying on their stomachs and accused assaulting one of them on the buttocks and at the back using a stick which according to the witness was approximately 70 centimeters long and 5 centimeters in diameter. He proceeded to disarm the accused and threw the stick into the fire so that it could not be further used on the inmates. He later, after coming from duty with the accused that night for they proceeded on patrol, learnt that one of the inmates had died. He observed that one of the inmates Onesai Kusena had swelling on the buttocks and that the swelling was pronounced showing signs of blood clotting and that they were blue black of peach black.

The witness did not seek, when he was testifying to exaggerate his testimony as he pointed out that he only saw accused assaulting one inmate and that accused was using moderate force. He did not seek to portray himself as a saint as evidenced by his acknowledging that at some stage at Tonhorai, the accused his superior had cautioned him about his behavior of drinking but that did not tarnish or taint his testimony about observations that it was accused whom he saw assaulting one of the inmates and that he disarmed and threw the stick in the fire so that it would not be used to further perpetrate assault. The witness generally gave his evidence well.

The 7th State witness, Anyway Mukoki, a security guard at Mbada diamonds confirmed arresting four suspects and then handing them over to the Mbada officers from where they were transported to the police base. The witness evidence was that the suspects were in good health when they were picked up for suspected panning. His evidence was just as per summary of State case.

The 8th witness, Lloyd Ruzvidzo a dog handler at Mbada diamonds evidence was basically that he accompanied the suspects from Mbada, to Chiadzwa diamond base where they were handed over to police details. He just like the other Mbada’s officer received the suspects mentioned. He mentioned that they appeared to be in good health to him and that he did not witness anyone of them being assaulted. Nothing much turns out of this witness evidence which was brief as per the summary of the State case and it was basically on his observations at the time that he received and handed over the suspects to the police force at Chiadzwa diamond base.

Constable Knowledge Bhobho one of the State witnesses who also came in contact with the deceased and complainants did not tell the court that at any stage when he pursued the escapes, whom he was fully aware had escaped from his custody and it was an offence he would be charged from misconduct they fell or got hurt. He did not observe the deceased fall headlong hitting on ground. He apprehended with the help of other officers the deceased who had sat down and Pikirai. He recounted how the two were subjected to assault by the accused person. He again explained the same mode and same weapon having been used by the accused and that they were further subjected to assault at the cells. He did not dispute his misdemeanor of having people in his custody escape but maintained his evidence that no other officer subjected the suspects to assault except the accused person.

The 9th witness, Doctor Member Kasongo, gave evidence to the effect that he concluded from his observations of the body of Tsorosai Kusena that the cause of death was traumatic shock secondary to assault. He stated that he did not deem it necessary to carry out a full post mortem as this would entail opening the body and carrying out internal examination yet basically because the cause of death was obvious from the injuries observed on the body of Tsorosai. Further, his observations and conclusion tallied with the history given to him by the police who handed over the body of the deceased that the deceased had been assaulted. The doctor explained that vomiting prior to death is not a rare occurrence. He ruled out diarrhoea of an adult for a period of just over an hour having the effect of causing death unless if it was cholera and also that if its cholera it would be rare in an adult. He also explained to the court that fear can cause diarrhoea. The deceased was being subjected to assault whilst locked up in cells and fear cannot be ruled out as a cause of diarrhoea. He however, was not given such history of diarrhoea by the police when they handed over the deceased.

He concluded cause of death was quiet obvious and vomiting could not have caused that but it was a normal thing which occurred in most cases prior to death of individuals according to injuries he observed, he then came to the conclusion of cause of death as traumatic shock secondary to assault. He ruled out that injuries he observed on the body of the deceased were consistent with the fall as suggested by the defence. The doctor pointed out that there were no facial or head injuries at all on the body of Tsorosai Kusena which he examined such that the issue of fall could not be substantiated.

The next witness to testify after the doctor, Musutani Chifamuna an assistant inspector with the Zimbabwe Republic Police attached to the CID. He testified that he was part of the investigating team, tasked to investigate the murder. The witness lucidly recounted how his team set out to Chiadzwa diamond base. After the preliminary proceedings of alerting assistant commissioner Muzeza the man in charge at the diamond base of their presence, they were given a memorandum which had been compiled at the diamond base. The witness told the court that from the memorandum he deduced that the deceased had fallen headlong hitting on a rock after he had escaped from lawful custody and was being chased by the police. The team went to the cells where because of the memorandum, he checked on the head of the deceased for injuries for he suspected those to be obvious given the deceased had been said to have fallen but he did not observe any injuries on the face or head of the deceased.

He observed that injuries on the deceased were concentrated on the lower back, on the buttocks, on the soles and on the knees. There were no head injuries or injuries to the upper body for that matter. The witness then caused photographs of the remains of Tsorosai the deceased to be taken and these were tendered as exhibits among the batch of photographs tendered as exhibit 5A to 5O and these included photographs of injuries observed on Onesai and Pikirai and photograph depicting the head and face of Tsorosai from different angles as having no injuries at all. As investigations progressed the witness, Chifamuna gathered that Onesai Kusena, Pikirai Kusena, John Gwite had also been assaulted by the accused. From evidence, he was notified the assailant was the accused following which he then observed the injuries on the complainant whilst in the company of Assistant Inspector Sithole who took the photographs which were tendered as another batch as exhibits 6A to 6P of photographs depicting various positions of injuries that were sustained or observed on the body of the deceased and on the complainants.

According to the witness, the injuries were on the lower back, buttocks, knees and soles. It was then that he advised the command at the base that is Assistant Commissioner Muzeza, that he was taking the witnesses for medical attention and for him to notify his superiors in Mutare of his observation. The witness told the court that Assistant Commissioner Muzeza told him to do his investigations and he did not give him the memorandum to carry with him to Mutare, although, he had earlier shown him the memorandum with information deceased had fallen headlong. He left with the information which he gathered from his investigations at the scene which was implicating the accused. He gathered the information from witnesses who included the civilians, the security forces that is army and police inclusive and proceeded to his superiors for he could not proceed without guidance from them since evidence was pointing to the accused a superior to him, a chief superintendent.

At a later stage the witness proceeded with the complainants to the diamond base where he drew a sketch plan from indications of the witnesses or the complaints which was tendered in court as exhibit 5. According to the witness, all those who he interviewed implicated the accused as the assailant and not that the deceased fell headlong on being chased and that injuries on the body which he observed were not on the head or face to support the assertion of deceased having fallen. He also confirmed that the distance which had been covered by deceased and Pikirai when they were re-arrested after the escape was about 4 kilometers and that the distance that the complainants and the deceased were caused to crawl to the cells was about 180 meters to 200 meters and that they had been caused to crawl by the officers who received them at the diamond base. He did not gather any evidence of assaults by Mbada security guards but that the complainants and deceased were caused to slap each other by Mbada security guards.

The witness generally recounted how he investigated the matter eloquently and he impressed the court as a competent and candid witness. Detective Assistant Inspector George Sithole confirmed the last witness’s evidence that he as a photographer with the CID department took the several pictures from different angled. The photographs depicting the deceased, the deceased head, the injuries on deceased’s lower back and buttocks. Photographs depicting the complainants that is the three of them with injuries on the back and on the buttocks which were tendered as exhibit 5A to 5P and 6A to 6O. His evidence was taken wholesome.

The last State witness, Chengetai Dorcas Nyadenga, a Chief Superintendent and Officer in Charge CID Mutare’s evidence was to the effect that she recorded a warned and cautioned statement from the accused in which the latter’s response was a denial of the allegations. She also told the court that she invited the accused for indications and that the accused told her he did not have any indications to make because he did not know anything about the matter. She was taken to task by the defence about not having referred the sudden death docket to the magistrate and she explained it was normal procedure that the police would seek guidance from the attorney general’s office and in this case the docket was converted to criminal because evidence was not supportive of sudden death of the deceased having fallen but was supportive of criminal docket and murder allegations where thus leveled.

We must point out that the witness exhibited maturity in the manner in which she testified. More so, when one views her evidence in conjunction with the accused evidence that the witness a chief superintendent was too junior to handle his matter and that an assistant commissioner or above was required to handle accused matter. She could have come with a view to fix or nail the accused who had demeaned her, not cooperated with her, tortured her, but she was mature and stuck to the docket having been compiled and referred to the AGs office and then finally referred for purposes of trial. Also that when she went to record a warned and caution statement the accused turned her away and only complied when summoned to the CID headquarters in Harare by her superior.

Lastly, as an example of the torrid time the witness was given by the accused is ascertain by the accused, “I am a military man and I cannot easily be disarmed”, on being asked to disarm by the witness, the Chief Superintendent in charge of CID for purposes of going for indications. The witness carried out her mandates professionally in the given circumstances and her evidence was easy to follow. She had a statement recorded from Assistant Commissioner Muzeza. She did not seek to cover anything. The fact that Assistant Inspector Muzeza was not called to testify by the State Counsel had nothing to do with her for, is entirely up to the State to decide which witness to call. That statement was laid bare by the witness in the docket and Assistant Commissioner Muzeza was at the defence disposal to be called as a witness and indeed he was called in as a defence witness. The witness gave her evidence well.

The defence in turn adduced evidence from two witnesses, that is accused and Assistant Commissioner Cornelius Muzeza. The accused, Mr. Chani recounted events of the 29th of September 2011 when he was second in command at the Chiadzwa diamond base under operation Hakudzokwi phase 15. He told the court that they had about 500 security officers inclusive of army and support unit details. On the fateful day the accused stated that he came back to the base at lunch time from tour of duty at other minor bases. It was upon his return that he learnt that there were suspects brought in by Mbada security guards and he later saw them chopping firewood. The accused told the court that his attention was drawn to the escapees, when he heard the guards whistling and shouting that they had escaped. He reacted by calling for escorts two female Zimbabwe National army officers and a canine handler and another constable then drove on along the eastern side of the base.

After a drive of about 5 kilometers he saw human movement on the hill for it was clearly visible, grass was burnt and he then caused the dog handler and a constable to follow up. Within a short space of time they came back together with the two suspects and the officer who had pursued constable Bhobho. The witness then told the court that he observed that the suspects shirts were dirty and the now deceased holding onto his tummy showing signs of agony and could not properly stand. Upon questioning him the deceased disclosed to him that he was injured when he was running. The other suspect Pikirai had dog bites per accused observations. The suspects boarded his vehicle on their own and were taken back to the base where they were handed over to the details that is constables who took them to the cells while he proceeded to pursue the other pair of suspects who were later brought back by Assistant Commissioner Muzeza’s team.

The accused told the court that before he went out for patrol at Zengeni with another team of security officers he observed lots of troops coming from the cells. The group he was to go with was to be headed by Assistant Inspector Mandizvidza, who according to the accused had a distinct smell of alcohol for which accused warned him. He basically described Assistant Inspector Mandizvidza as being a nuisance that night. They had to look for him in a bottle store, retrieve the alcohol from him and also had to wrestle him away from a woman of the night at a bottle store and thus the accused decided the charge Assistant Inspector Mandizvidza for indiscipline and that he had notified the latter of his intention and at night Assistant Inspector Mandizvidza escaped from the camp, according to the accused.

The accused told the court that he heard noise from the cells at around 9pm when he was taking a bath and he suspected that maybe his officers were assaulting the suspects. So, he sent one chief inspector to go and investigate. It was then that he was advised that one of the suspects had died in the cells following which, the accused proceeded to brief the man in charge who was asleep. He woke him up and notified Assistant Commissioner Muzeza. The accused told the court that they found out that the two officers manning the cell Bhobho and Manoti had absconded; this was contrary to the army detail who was guarding with them and also contrary on to the civilian witnesses testimony. After a parade of the troops none of them said they knew what had happened to the deceased accused and his superiors asked Onesai and Pikirai Kusena who revealed that the deceased had been tripped down by constable Bhobho during the racing for the recapture and that he fell with a heavy thud and that the latter in the cells had or suffered from diarrhoea and vomited and was discovered dead by a guard at hand over take over time.

The accused suspected Constable Bhobho and Manoti and thus he disarmed them. He further suspected the deceased had died following severe assaults from Mbada security guards as given to him by Pikirai Kusena who disclosed they had been assaulted while digging a well and that is the reason why they escaped thinking they would be subjected to the same assault by the police. The accused also told the court he also wanted to charge officers Bhobho and Manoti and that he notified them, he wanted to charge them for improperly performing duty. The rest of what the accused told the court was that there was no need for a criminal docket to be compiled for he had not done anything and that the officers who pursued him could do nothing to him for they were juniors and of course they were flaunting procedures in the manner they were carrying out investigations inclusive of the chief superintendent whom he accused of not knowing procedures on carrying out indications.

At this stage suffices, to mention in passing that Mr. Chani is a man of many words and quite dramatic. In the process he extensively contradicted himself oscillating from imputing assaults of suspects were by security officers when none of the police officers had assaulted the deceased and the complainants to imputing security guards from Mbada, to mentioning that the suspects implicated constable Bhobho as having tripped the deceased and on another breath mentioning that the suspects or the complainants never mentioned having being assaulted by security officers and yet security officers include constable Bhobho, Manoti, the accused and members of the army. The second defence witness Cornelius Muzeza’s testimony was brief. He recounted events of the 23rd of September 2011 in so far as he was back at the diamond base Chiadzwa, he picked other two suspects who had escaped from shopping Centre and took them to back to the diamond base. The witness told the court that when he picked the suspects they got into the vehicle on their own. He did not witness them being subjected to assault, this tallied with the suspects or with the witnesses, the complainants evidence that is Onesai and John Gwite that the security officers who re-arrested them did not subject them to any assault. He told the court that he on the night in question was woken up by accused who advised him that one of the suspects in the holding cells had died and that the suspect had fallen during chase then vomited and suffered diarrhoea at night culminating in his death.

Assistant Commissioner Muzeza said he did not believe this revelation hence he immediately upon receiving this report from the accused called for a parade so as to identify the culprit. He suspected murder due to assault. He contrary to the assumption by the accused that Assistant Inspector Mandizvidza had called Mutare CID, told the court that he immediately notified Marange Police Station and raised CID section so that they could go to the diamond base and investigate for he was suspecting murder. The witness’s evidence did not help the defence case in any manner. He was not at the base most of the afternoon and further he was not with the accused at the time of re-arrest of the now deceased Tsorosai and Pikirai and he was not at the holding cells. On being asked about the memo to command the Assistant Commissioner gave no satisfactory reason for not disclosing the contents simply saying it was meant for his superiors. He was economical with information saying it was for his command.

The defence counsel or State counsel and the court did not probe him further on that. The court will not explain why the state and defence did not probe him but on the part of the court it was obvious the memo was based on information from the accused that the deceased sustained injuries after he fell during the chase and had been tripped by constable Bhobho and that the latter vomited and suffered diarrhoea. The Assistant Commissioner’s reaction about the memo only buttresses investigating officers details Assistant Inspector Chifamuna that the memo which he was shown was misleading as it, was not supported by evidence on ground and that the command at the diamond was by that memo seeking to mislead the Zimbabwe Republic Police force command on what had actually transpired at the base. Further that the court did not probe Assistant Commissioner Muzeza for if the court required him to give detail he would have been notified to proceed and do so. The court did not probe Assistant Commissioner Muzeza because the Zimbabwe Republic Police command had proved it was on top of the situation by processing the criminal docket based on evidence before it, hence it was not really necessary.

From the forgoing it is clear the deceased Tsorosai, Onesai Kusena, Pikirai Kusena and John Gwite were picked by Mbada diamond security guards for suspected illegal panning and handed over to the security officers at the diamond base. It is also clear they were caused to crawl on their knees to the holding cell about 200 meters away thus explaining the knee injuries on all of them. No one can dispute that the four were generally fit and strong given they had picks and shovels. Also apprehension, it is given they crawled about 200 meters on rocky hard surface and given that after that they chopped firewood and then escaped and they ran long distance, Tsorosai and Pikirai Kusena for about 4 to 5 kilometers while the police were pursuing and Onesai Kusena and john Gwite ran for about 20 to 30 kilometers while the police were pursuing. They also all jumped into the trucks on their own that is the truck being driven by accused and the truck which was being driven by assistant commissioner Muzeza without aid on re-arrest. One cannot help but agree they were generally fit.

From the oral evidence of the civilian witness, security officers and the four doctor’s documentary evidence, the post mortem report exhibit 1, then doctor Mudziwepasi’s affidavit of examination of Onesai Kusena exhibit 2, doctor Zimbora exhibit 3 affidavits on examination of Pikirai Kusena and doctor BN Mutsekwa, examination of John Gwite. It is common cause that the deceased and the complainants were subjected to assault and sustained injuries which were attributed to blunt trauma or blunt force. It is not in dispute that the complainants were assaulted and it is also apparent from evidence on record that the deceased was assaulted and sustained injuries on his back from which he succumbed to death. Doctor Kasongo’s evidence material to this assertion for cause of death was given as traumatic shock secondary to assault. The doctor clearly spelt it was not necessary to open up or carry out a full post mortem on deceased because the cause of death was obvious. His observation that there were no head injuries on the deceased prompting him to seek to open the head is supported by exhibits 5B, C, D and F which shows no head or facial injuries on Tsorosai Kusena.

The court wishes to take judicial notice of the fact that it is not every body that is taken for post mortem, that doctor seek to open in establishing cause of death. Even if doctor Kasongo is not a pathologist he compiled a post mortem report. If the body had been taken before pathologists were the cause of death is obvious the issue of opening up for purposes of internal examination is not relevant. Where the cause of death is obvious there is really no need to open the body. It is only where cause of death is hazy or in circumstances where chemical situations are alluded to as cause of death that internal organs have to be opened up and examined for cause of death. In this case, the doctor had history of assault which is supported on record in record and then professionally made observation coming up with conclusion. The other complainants were examined by different doctors and they all detected assaults which tallied with the manner in which the doctor Kasongo compiled post mortem also observed injuries on the back and lower back , on more less the same area or zone, confirming the area of concentration of the assaults.

Maybe further in passing, it is important for the court to comment that generally when a human being is about to fall or falls the defence organs for examples fingers and hands will naturally engage in preparation for the fall, that is a natural phenomenon. This would mean that if the deceased had fallen headlong as suggested by the defence then he ought to have had injuries on the fingers, the wrist even fractured the hand and naturally facial injuries on the nose, on the face and or on the forehead. If he had hit on a rugged surface then like a stone such as suggested by the accused in the hills, such injuries should have been observed, none were observed by the doctor, the civilian witness, the security officers who testified and the investigating team. This then leaves the doctors finding intact or unchallenged. The injuries were consistent with blunt trauma in respect of the deceased and complainant and this means the object used to inflict assaults was a firm or hard object.

The witnesses who were at the scene at the time of assault all said the accused used one stick which from the description cannot be termed as small stick or a switch for it was thick. The court is alive to the fact that the witnesses talked of accused having sticks but none of them said accused assaulted the complainants and the deceased using sticks, they all maintained that he used one thick stick to assault the deceased and the complainants. The fact that Assistant Inspector Mandizvidza threw the stick in the fire for it not to be used again on the inmates is understandable given the prevailing situation at the diamond base at the relevant time then. It was not intentional destruction of evidence or exhibits and the none-availability of that stick does not change the complexion of the State case in any manner given the evidence. Assistant Inspector Mandizvidza threw the stick restraining a superior from perpetrating further assaults on the suspects in front of juniors. Most of the facts of this case are common cause. The only issue the court had to decide on was as regards who assaulted the deceased culminating in his death and who assaulted the complainants causing injuries observed by the investigating team and the four doctors and of course the issue of degree of liability.

The witnesses, that is the investigating team, the complainants who are civilians and security forces that is army and police pointed to the assault having been perpetrated by the accused who alternatively assaulted the inmates in a prone position. The complainants themselves did not implicate any other police officers on the assault but mentioned that it was the accused who subjected then to severe assault. The question is why would they seek to protect their assailants and nail the accused person as their assailant. The civilian witnesses, we must point out at this stage are unsophisticated rural folk who stands to benefit nothing by falsely implicating the accused. They only recounted how Dryers allas Wanyepa a Mbada security officer caused them to slap each other and how on being received, the police made them crawl, to turn around then lie that it is the accused who instructed them to take the prone position and assault them would defy logic.

The accused whom the court has described earlier as a man of many words was indeed like a chatterbox especially under cross examination by the said counsel. He propagated that the police and civilians conspired to falsely implicate him and that the police influenced the inmates to escape. One would wonder why constable Bhobho had to run at almost the same pace with the suspects for 4 to 5 kilometers trying to apprehend them and re-arrest them if he had encouraged them to escape in the first place, because whether he chased and got them he had flaunted the police regulations because they had escaped from lawful custody and still be charged. So, if he had influenced them then one wonders why he chased and pursued them to that extent. The accused sought to propagate that the civilians and the police conspired falsely to implicate him and this was not substantiated. When pressed for comment or justification of the conspiracy he sought to portray that the troops were in disciplined and in syndicates with the illegal panners while he was out to guard the precious diamond mineral for the State. That is indeed absurd. It is an absurdity that he asserted he was the only law enforcement agent out of about five hundred security forces who was duty conscious, an assertion which can be dismissed with the content that it deserves.

More so, when we consider that there were other senior offices at the diamond base of equivalent rank in the army as well as in the police and also the assistant commissioner who was above the accused. What boggles the mind is why did the witnesses and the security forces not point a finger at the other superintends, the lieutenants in the army, Assistant Commissioner Muzeza and just implicates the accused as the person who had assaulted the deceased and the complainant. We took his pronouncement that he was the only duty conscious officer as display of self-impotence. The accused impressed the court as an ego centric men who had no respect for other officers, even fellow officers for he repeatedly stated they would do nothing to him since they were juniors. Even Assistant Commissioner Muzeza he expected him to just take the memo and his mere say so word without carrying out investigations as regards what had transpired thus taking other officers for granted and being the only duty conscious officer. He labeled the investigating officers as having flaunted procedures.

He again propagated another basis for false implication was that he had threatened to charge Mandizvidza, Bhobho and Manoti under the disciplinary hearings. This again does not support the defence case because then, how do the civilians come into being charged under disciplinary allegations and how do the four doctors come in to the puzzle and fit into the puzzle of conspiracy to nail the accused because there are impending charges against the junior officers in the police rank. The accused denied having subjected the deceased and complainants to assault but does not remove himself from the vicinity. He was indeed there when they were re-arrested and drove deceased and Pikirai Kusena to the base. He was there when Onesai and John Gwite were finally locked up. He was notified of the death of the deceased but this time the man in command and the man who was duty conscious did not have the zeal to go to the cell to ascertain the cause of death. One wonders what had happened to the duty conscious officer.

A lot of questions come to mind and emanate from the manner the accused testified. He on being shown the photographs of injuries on the deceased’s and the complainants came up with yet another interesting version that he had not seen the live buttocks and the live injuries pointing out that the photographs could have been manipulated taking note of advancement of technology and that the doctor examined a wrong person altogether. We could write a book about the dramatic assertions from Mr. Chani in his defense but suffices to say in his defence Mr. Chani appeared to be a man on a fishing expedition, merely gambling, to try his luck in the face of overwhelming evidence from the State. Mr. Chani did not impress the court as a candid person. His version was not only misleading but unsatisfactory, untruthful and mischievous. In short he was incredible.

The State has rightly conceded the charge of murder with actual intent, cannot be sustained in the present case. The accused when all is considered did not desire death or aim to kill the deceased hence the aspect of murder with actual intent not being capable of substantiation in the present case. The *locus clasicus* when it comes to defining actual intention, constructive intention and culpable homicide, the case of the *State v Mugwanda,* 2002 Vol 1,ZLR 574, 580G to 581F*,* is instructive. Also, guide to criminal law by Professor Feltoe at page 104 clearly shows the essential element of murder with constructive intention. The Mugwanda case cited above at page 580G clearly, the learned honorable Chief Justice CHIDYAUSIKU with the concurrence of the judges of appeal ABRAHAM and ZIYAMBI expounded that intention to kill is not only when the accused necessarily requires that to cause death but is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result.

If the accused subjectively foresaw the possibility of his act of causing death and was reckless of such result. The form of intention known as (*dolas eventualis)*, the case clearly postulates the distinction between murder with actual intention, murder with constructive intention and culpable homicide on the other side. For murder with constructive intent what is required is that the accused foresees result, the possibility of death occurring and not that it has to be certain but the possibility of death occurring. *(In casu*) we are looking at the manner in which caged or cornered deceased and complainant were subjected to assault and the nature of injuries, the nature of assault, the nature of injuries of sustained, the casulitity. That is what we are looking at vis-à-vis the notion of whether murder with constructive intent has been established or not. We are indebted to both Mrs. Matsikidze and Mr. Thondhlanga for submissions enclosed of the cases and the manner of the presentation of the case before hand which has enabled the court to analyze evidence laid before it.

Murder with actual intent as earlier mentioned can only be sustained where the intention to kill is established. We will not dwell on actual intent for it has not been substantiated and it has not been established. We will now turn and look to murder with constructive intention in relation to the evidence before the court. The essential elements are ably summarized as foreseeability of real possibility or real risk that the conduct may cause death. From the common cause factors of undisputed assertions in this case, it is apparent the deceased were subjected to assaults from which deceased died and the three complanaints sustained injuries. The evidence clearly attributes the fatal blow and assaults to the accused who ordered the victims to take prone position and using a stick assaulted them on their back and the buttocks. The assaults were protracted and severe considering the prone position especially on the deceased who was subjected to the protracted assault when he was groaning and sprawling helplessly on the floor.

The court makes a finding that on the fateful day, the accused foresaw the real possibility or real risk that his conduct may cause death or that he foresaw the inevitable eventuality of deceased’s death but persisted with his conduct. Accordingly, the State has substantiated murder with constructive intent. The accused must have realized that there was real risk or possibility that his conduct may cause death but continued to engage in the conduct despite the risk or possibility. He is accordingly found guilty of murder with constructive intent as defined in section 471B of the Criminal Law Codification Reform Act [Cap 9.23] in respect for count 1. As regards counts 2 to 4, the three counts of assault as defined in section 89 of the Criminal Law Codification Reform Act [Cap 9:23], the State has discharged the required onus. There is overwhelming and clear evidence that accused subjected the three accused persons to severe assaults in prone position as a result of which they all sustained serious injuries.

Accused is accordingly found guilty of murder with constructive intent in respect of the first count and guilty of assault in respect of the three counts.

**MR THONDHLANGA ADDRESSES COURT ON EXTENUATION:** Thank you my lord and gentlemen assessors. I also submit my lady and gentleman assessors that this is one matter where the court must make a finding that indeed there are extenuating circumstances. I will urge the court to consider the fact that the suspects and the deceased were only subjected to the assault after they had attempted to escape from lawful custody. The court should take note of the fact that obviously the accused as a police officer felt annoyed by the fact that people were properly on suspicion of committing offences by illegally panning diamonds and ran away from the police. This is not a case where there was premeditation on the part of the accused to subject the suspects and the deceased to any form of assault. In fact, the assault was prompted by the conduct of the deceased and those who were in his company.

My lady and gentleman assessors I will urge the court to consider the very fact that accused did not desire to cause the death of the deceased should be put to the accused’s credit in assessing extenuation. My lady, for this proposition I will refer the court to the case of *Siluli v State,* S146/04, if these factors to be taken cumulatively with the reason that prompted accused to then assault the deceased, the court should be able to make a finding that this is a matter which was committed in circumstances were extenuation can be found. My lady, in the case *Jaure v State,* 2001, Vol2, ZLR, p393, the court gave a guideline on how the court should approach the issue of extenuation. Two approaches were given but they will lead to the same result. I will just emphasis on the first approach which I urge the court to take. The court is to consider first those factors which reduced the accused’s moral blameworthiness and then weigh them against the aggravating features.

It is my respectful submission, my lady and gentlemen assessors that in the particular case the court should seriously take note of the fact that the accused intended to curb the commission of crime in the diamond fields and that is when it came to his attention that suspected illegal diamond dealers had escaped from police custody. He was greatly infuriated and this influenced him to act in the manner he did. I therefore urge the court to take that into consideration and make a finding that there are extenuating circumstances in this case. My lady, those will be my submissions unless there are any other issues you would want me to address on.

MWAYERA J. No, defence counsel.

**MS MATSIKIDZE REPLIES ON EXTENUATION.** Thank you my lady and gentleman assessors. On extenuation I would urge he court to make a finding that there are extenuating circumstance in the manner this offence was committed. I would refer this court to a plethora of case law that establishes that were a person is convicted of murder with constructive intent, that on its own is extenuating. I will refer the court to the case of *State v Mugwanda,* 2002, Vol 1, ZLR*,* where the learned Chief Justice CHIDYAUSIKU said, “It is now accepted that constructive intent on its own or taken together with other factors can constitute extenuation. I will further refer the court to the case of *State v Jecko,* 1981, ZLR, Vol 1*,* where the court held that the finding of a constructive intent to kill will not necessarily lead to an overall finding of extenuation, that is a factor which must be put on the credit side. I will also refer the court to the case of *State v Zigwashla*, 1967, Vol 4, SLR3566, the learned judge of appeal HOLMES said, *“(of dolus eventualis)*, while it cannot be said that this factor must necessarily be an extenuating circumstances; in many cases it may well be so either alone or together with other features depending on the particular facts of the case.

It is therefore my submission, my lady and gentleman assessors, that it is the State’s submission, the fact that he has been convicted of murder with constructive intent can operate on extenuating. I find no other factors on extenuation. Those will be my submissions my lady and gentleman assessors.

**RULING ON EXTENUATION.**

MWAYERA J. We are giving a ruling to the application which has been placed before the court by Mr. Thondhlanga on extenuating circumstance. As submitted by both Mr. Thondhlanga and Mrs. Matsikidze, this is a case where the accused has been convicted of murder with constructive intent and the circumstances of this case are such that we are of the view and hold the same view as both counsel that the conviction on its own amounts to extenuation. More so, in this case when you consider the conviction coupled with submissions by Mr. Thondhlanga, that is that the fatal blow and severe assaults were inflicted after the suspects had escaped from lawful custody; the desire of the accused was not to cause death but to contain crime as a policeman. The moral blameworthiness therefore, is reduced and we find that in this case extenuating circumstances are indeed in existence.

COURT ADJOURNED.

COURT RESUMES.

MITIGATION.

MR. THONDHLANGA. My lady, the accused is an adult aged 51. He is married and has family responsibilities. He is a first offender my lady. Prior to the commission of this offence the accused had worked in the Zimbabwe Republic Police for a period of 26 years and during all those years that he was in the police force he never committed any offence. He does not have any record of having subjected any suspects to assaults. I will therefore urge the court to consider his personal circumstances when meeting out the appropriate punishment. I will further urge the court to consider the circumstances of the case in particular the fact that this is an offence which was committed whilst the accused was within the course and the scope of his employment. He reacted to a situation that he had precedent by the deceased and the three complainants. Had it not been for the conduct of the deceased and the three complainants he might not have found himself being hauled before this court?

My lady, whilst I appreciate the seriousness of the offence that accused has been found guilty of in respect of the first count, I will urge the court to show a modicum of leniency against the accused person especially if regard is heard to the fact that he did not desire to cause the death of the accused and also the fact that this happened whilst he was on duty. My plea before the court in respect of the conviction for charge of murder is that this is one case were the court can properly consider the imposition of a shorter period of imprisonment as opposed to a longer one or alternatively as opposed to a life sentence. My lady, I will not labor the court much with authorities, I am of the view that quiet a number are at the disposal of the court. With regards to the 2nd, 3rd and 4th counts, my lady, I will urge the court to consider the factors that are set out in section 89 sub section 3 of the Criminal law Codification and Reform Act.

It is my view my lady that once this court has made the finding that severe force was used the court will therefore rule that injuries that were sustained were quiet serious and that would take into consideration in passing the appropriate sentence but my lady, the submission I intend to make is that it is not always the case that where injuries are considered to be very serious the court will resort to imprisonment only, it may still be persuaded to consider a non-custodial sentence. I will refer the court my lady to case of *State v Mpofu* 1992, Vol 2, ZLR, p66, in that matter the accused was charged of the then common law offence of assault with intent to cause grievous bodily harm. The court ruled that imprisonment is not invariably the only penalty for assault with intent to cause grievous bodily harm. I therefore urge the court in the present circumstances that for the purpose of the sentence on the three grounds of assault, it may be appropriate for the court consider the counts as one for the purposes of sentence and possibly impose a fine against the accused.

My lady, if the court is not swayed enough with my submission in regard to the conviction on the three counts of assault I will proceed to urge the court in the event that it decides to impose a custodial sentence, that the sentence so imposed should run concurrently with the sentence that will be imposed on the conviction for murder. My lady, these will be my submissions unless there are other issues the court might want me to address.

MWAYERA J. No, thank you.

AGGRAVATING.

MRS MATSIKIDZE. In aggravation I would submit that in respect of count 1 the accused person has been convicted of a serious offence, One warranting a lengthy custodial sentence. The loss of human life, the sacred of human life can never be over emphasized my lady and gentlemen assessors, regardless of the circumstances leading to such loss of life. The fact that the legislature in its wisdom provided for a life sentence where an accused person is convicted of murder, is instructive my lady and gentleman assessors. It is further submitted my lady and gentleman assessors that the accused person was a senior police officer. It is submitted that as his duty in his duties as a police officer he was meant to protect the citizens whether or not they had breached the law. That they had escaped from lawful custody was a criminal offence in terms of which there were laid procedures for which he could have charged them. He chose to take the law into his own hands and meet out punishment, the punishment so severe as to result in the loss of a life within the same night the punishment had been inflicted.

The punishment also so severe as to inflict life threatening injuries on one of the complainants Onesai Kusena. It is further submitted my lady and gentleman assessors, that the lack of contrition on the party of the accused person is aggravatory. There is never mention that he apologized to the family of the bereaved and to the complainants? We were told my lady and gentleman assessors that the deceased was a man of 34, married with two children, the eldest of whom is in grade 2. The younger one of preschool age. While the accused serve the sentence for both the murder and the assaults. Upon finishing serving his sentence he has a chance to go back to his family. The same cannot be said of deceased, the hardship that his widow will face is one that can only be imagined or explained by the one who would have experienced it. The hardship that his orphans will experience from this tender age and not knowing the love of a father from childhood into adulthood with no father figure in their life can never be over emphasized, yes, there maybe uncles, there may be other relatives, there maybe even step fathers but those people would never take the place of a biological father.

It is my submissions further, my lady and gentleman assessors that society reposes confidence in the judiciary and the sentence that the court is going to impose should reflect the confidence that the society reposes in the judiciary, one that registers the courts displeasure at the conduct by the accused person and others of like mind that lead to the death of a suspect in police cells. I refer the court in considering sentence to the case *of State v Mugwanda,* 2002, Vol1, ZLR*,* were in setting aside the sentence of death that the court a quo had imposed and considering the circumstances in which the accused person had committed the offence the Supreme Court altered the sentence to one of life in imprisonment. In that case my lady and gentleman assessors the accused had inflicted one stable wound to the deceased resulting in instant death. I would refer the court to the case of *State v Siluli, SC146/2004*, where the accused person was sentenced to 13 years in imprisonment for murder with constructive intent. I would also refer the court to the case of *State v Labhushani*, my lady and gentleman assessors unfortunately I did not have the full citation of the case but in that case the accused was sentenced to 15 years in imprisonment for conviction on murder with constructive intent.

It is therefore my submissions, my lady and gentleman assessors, that an appropriate sentence in circumstances for the first count would the sentence in the region of 12 to 15 years for the first count. On the 2nd to 4th count my lady and gentleman assessors, I would refer the court to section 89 of the Criminal Law Codification where it says were a person has been convicted of assault he is liable to a fine up to or exceeding level 14 or imprisonment for a period not exceeding 10 years or both. I would further refer the court to sub section 3 of section 89, where it is in determining an appropriate sentence to be imposed upon a person convicted of assault and without derogating from the courts power to have regard to any other relevant considerations, a court shall have regard to the following. I will refer the court specifically to paragraph E, where it says whether or not the person carrying out the assault was in a position of authority over the person assaulted.

As I said earlier on my lady and gentleman assessors the accused was a senior police officer. He had 26 years’ experience in the police force. His experience should have assisted in exercise self-restraint as opposed to meeting out punishment for an offence for which he had legal remedy at his disposal, granted he was on national duty but my lady and gentlemen assessors national duty can only be executed only in the parameters of the law. It is my further submission, my lady and gentleman assessors that considering the injuries that the complainants in count 2 to 4 sustained, imposing a fine for those offences would be trivializing the nature of the injuries that they sustained. I would urge the court my lady and gentleman assessors, to impose custodial sentences in respect of counts 2 to 4, that it is not less than one year for each count and as suggested earlier on the period of 12 to 15 years in respect of count 1. Those will be my submissions my lady and gentleman assessors, unless the court wishes me to address it on specific issues.

MWAYERA J. No, thank you. Defence counsel any point of law arising?

MR THONDHLANGA. No response my lady.

MWAYERA J. Defence counsel did the accused suffer any pri-trial incarceration?

MR THONDHLANGA. Indeed my lady but it was for a very short period that is why I did not make reference to it.

**SENTENCE**.

MWAYERA J. In an endeavor to reach at an appropriate sentence we have considered all mitigatory factors and aggravating factors submitted by defence and State counsel respectively. Mr. Thondhlanga pointed out in mitigation that the accused is a first offender and a family man with some responsibilities hence dependency. Further that the accused prior to commission of the offence had served the Zimbabwe Republic Police as a law enforcement agent for a period of 26 years without any blemishes. Credit should be given and ought to be given for such service. The court will also take note of the mitigation as submitted that the offence was committed when the accused was in the course of employment, his desire was not to bring about the death of the deceased Tsorosai Kusena but curb crime of illegal panning of diamonds. The court will also take all extenuating circumstances submitted by both States and defence counsel as mitigatory for purposes of assessing sentence that accused stands convicted of murder with constructive intent.

That on its own is taken as mitigatory by the court. In respect of all the counts mitigatory factors highlighted apply for the assault offences for which the accused has since been convicted of. The court will take due regard to the fact that the assault and the murder with constructive intent occurred after the suspects had escaped from lawful custody. It was not an attempt to escape; they had escaped from lawful custody. However, as given in aggravation by Mrs. Matsikidze, precious human life was lost and it cannot be replaced. The courts have to guard sanctity of human life and society looks up to the courts to meet out appropriate sentences were precious human life is lost. More so, in circumstances where it could have been avoided. The circumstances under which Tsorosai Kusena a family man lost his life could have been avoided by not taking the law into one’s own hands and meeting out instance justice where the legal provisions are clearly available as regards what would happen to people who would have escaped from lawful custody.

In this case there was plenty of evidence that they escaped and pursued were by the police who did not lose sight of them and finally apprehended. One fails to understand why the accused decided to be the law unto himself and inflict severe and brutal assault on the deceased’s and complainants respectively. The assaults, the manner in which it was perpetrated in prone position putting the head to the ground, raising the buttocks and back for purposes of facilitating an assault is not only cruel but brutal manner of attacking ordinary civilians not trained in military in any manner for suspected illegal panning not proved, for our criminal hallmark, is one is innocent till proven guilty by a court of law, that should be taken in aggravation. The accused’s conduct being a Chief Superintendent cannot be condoned. He ought to have led by example to junior officers as opposed to abusing his position and showing the bad example that suspects can be subjected to abuse by assaults when they are in holding cells.

No help was rendered to the suspects after the assaults showing no remorse or contrition on the part of the accused that should be taken in aggravation. Even shortly after the occurrence of death as shown from evidence on record accused continued to bath and when he finished he did not show any remorse or any signs of regret or seek to render assistance to the complanaints who were still alive. The assault only stopped after being restrained by another officer. From the manner and circumstances surrounding the commission of the offence the court will take it that the accused in his position as a Chief Superintendent had become a menace and a law unto himself at the diamond base. His conduct of assaulting a suspect culminating in his death and assaulting the three complainants causing serious injuries when they were caged in a holding cell meaning they were defenseless does not only tarnish the image of the whole police force but makes society lose confidence in the police. The community looks up to police officers for protection and enforcement of the law and certainly our laws do not allow subjecting suspects to torturous, inhuman and degrading treatment as was done by the accused on the day in question.

His conduct on the day in question does not only tarnish the police force but tarnishes the whole image of the security force for this operation which was a good cause of guarding the minerals of the country, the diamond according to the evidence given by the accused and State witnesses had officers from the Zimbabwe National Army included. So, the conduct of the accused does not only tarnish the Zimbabwe Republic Police but also the Zimbabwe National Army who were on a mission on national duty on good cause to protect the precious mineral in the country or in the State. Serious bodily harm was occasioned to the complainants and those offences are certainly calling for a custodial term more so when one considers that it was not one blow but protracted severe assaults of civilians in prone position and life was also lost. The offences certainly call for lengthy imprisonment term. The accused abused his position of authority and uncontrollably assaulted the deceased who lost his life and assaulted the complainants severely causing severe and serious injuries. In passing sentence however, the court has to consider the accused, the societal interest, the nature of the offence and seek to strike a balance with the interest of administration of justice whilst at the same time tempering justice with mercy.

It is with that in mind that the courts will treat counts 2 to 4, the assault cases as one for purposes of sentence and also order the sentence in respect of counts 2 to 4 to run concurrently with the sentence that will be imposed in respect of count 1, the murder with constructive intent. We hereby hand down sentence. Count 1, 18 years imprisonment. Count 2 to 4 as one for sentence, 3 years imprisonment. The whole of which is ordered to run concurrently with the sentence in respect of count 1. Sentence handed down.

MRS MATSIKIDZE. Indebted my lady and gentlemen assessors.

MR THONDHLANGA. Most indebted my lady.

COURT ADJOURNED.

Certified True & Correct

**L.CHIPIDZA**

**EXECUTIVE ASSISTANT**