

THE STATE
versus
MAKAIKA MILANZI
and
ANTONY KUMBULA
and
STEPHEN ZIMOWA
and
TICHAONA SODA
and
ASANI CHIKWANDA
and
TENDAI JONGWE
and
CHRISPEN SIBANDA

HIGH COURT OF ZIMBABWE

CHITAPI J

HARARE, 4, 5, & 7 July 2016; 1-4 August 2016; 12,13,16,26 & 30 September 2016;
31 October 2016; 28 November 2016; 12-15 December 2016; 4 January 2017;
3 & 4 April 2017

ASSESSORS: 1. B.B. Kunaka
 2. A.G. Mhandu

Murder

T Mapfuwa, for the State
T C Masara, for the 1st accused
J Rwodzi, for the 2nd accused
D Halimani, for the 3rd accused
V Makuku, for the 4th accused
V C Maramba, for the 5th accused
S Chatsanga, for the 6th accused
7th accused in person

CHITAPI J: On their initial appearance before this court on 4 July, 2016, the 6 accused persons were arraigned together with another accused person Crispin Sibanda who was not represented. The prosecutor withdrew before plea the indictment against the said Crispin Sibanda who had been listed as the 7th accused. In passing it should be noted that the

accused persons were not appearing on the indictment against them before the High Court for the first time. They initially appeared before CHATUKUTA J with assessors Messrs Mutambira and Tutani in June, 2011. Regrettably one of the assessors Mr Tutani passed on before the trial of the accused persons had been concluded. The accused persons were duly advised of the demise of the late assessor. The death of the assessor meant that the court hearing the case was no longer duly constituted as required under s 3 (a) of the High Court Act, [Chapter 7:06] which provides that for the High Court to be duly constituted for purposes of exercising its jurisdiction in a criminal trial, it should consist of a judge and two assessors.

Section 8 of the High Court Act makes provision for the continuation of a trial in which one of two assessors' passes on or in the opinion of the judge becomes incapacitated in the course of the trial, for the trial to continue to be finalized by the court composed of the judge and the remaining assessor. The continuation of the trial with one assessor is subject to firstly the judge considering it fit to have the matter continue with one assessor. Secondly if the judge considers it fit to continue as aforesaid, the accused person(s) and the prosecutor should give their consent. If such consent has been given, the trial then proceeds with one assessor. *In casu*, the accused person refused to consent to the trial proceeding with one assessor. Consequently a trial *de novo* had to be instituted and this is how the matter came to be before this court.

The indictment against the accused persons was that, they, being residents of Epworth suburb save for the 6th accused who resides in Mbare, individually or collectively and with intent to kill or realizing that the real risk or possibility that their conduct might cause death, murdered Christopher Mushonga; an adult male of 2 Crackley Lane Mount Pleasant Harare. It was alleged that they caused the death of the said deceased by striking him upon his body with an AK 47 rifle butt, bolt cutters, hands and booted feet on 18 June, 2009. He died of injuries sustained in the assault. All the 6 accused persons pleaded not guilty to the charge.

The summary of the evidence of State witnesses was produced as Annexure 'A' and an addendum thereto as Annexure A1. The defence outlines in respect of all the accused persons were produced as Annexures B, C, D, E, F and G respectively. In summary the defence outlines were to the following effect as to content.

Accused 1

He admitted and adopted his warned and cautioned statement, the contents of which he sought to adopt as the basis of his defence. He alleged that he was wrongly and falsely implicated in the matter. He denied conniving with any of the co-accused to commit the

alleged crime. He averred that nothing was recovered on his person or at his home upon his arrest on 8 July, 2009 to connect him to the offence. He outlined that he would deny “every fact and incident incriminating him”, calling the State to prove its allegations.

Accused 2

He averred that he knew 1st and 3rd accused persons as his customers who would charge their phones at his cellphone charging business. He stated that he never visited No. 2 Crackley Lane on the night of 18 June, 2009. He only met for the first time, 4th, 5th and 6th accused persons as well as Crispen Sibanda after he had been arrested for this case. He denied that he ever assaulted the deceased nor stole any cellphone from the deceased’s residence. He denied implicating the 3rd and 5th accused or any other person to the offence. He denied making a warned and cautioned statement and averred that he was made to sign one due to threats of assault. He denied being at the crime scene.

Accused 3

He denied committing the offence and averred that upon his arrest police assaulted him and shot him three times to exact a confession from him. When he was shot he alleged that he was not armed and neither had he resisted arrest or attempted to flee. He outlined that because of the assault and torture, he was forced to make a general statement implicating himself and others in the commission of the offence.

Accused 4

He denied committing the offence and averred that he was falsely implicated. He denied knowing accused persons 1,2,3,5 and Crispen Sibanda. He averred that he denied every fact or incident incriminating him in the offence and put the State to the proof thereof. He stated that he would abide by his warned and cautioned statement.

The accused identified assistant inspector Tendai Nzirawa as the policeman who shot him and threatened to kill him if he denied knowing any of the accused persons prior to his arrest save for 2nd accused. He believed that if any of the co-accused were implicating him, it was because they had been tortured and would not have freely and voluntarily implicated him.

The accused averred that on the date of the alleged commission of the offence he never went to the deceased’s residence but was home. He averred that he could not attend the deceased’s house for indications as he had been savagely assaulted and tortured. He therefore had no idea where the deceased’s residence was. He lastly outlined that there was nothing

recovered from his home to link him to the offence and that no identification parade to identify the perpetrators of the offence was conducted.

Accused 5

He averred that he was falsely implicated and did not know any of the accused persons except Crispen Sibanda who was the accused's landlord's son. He outlined that nothing stolen from the deceased's residence was recovered from him. He alleged assault and over detention for over a week by the police.

He outlined that police stage managed a scenario whereat police produced a bag with an A-K rifle from the boot of their vehicle. The police then forced the accused to simulate indications as to where the gun was hidden in some bushes in the Masembura area.

Accused 6

He denied involvement in the assault which culminated in the death of the deceased. He raised the defense of *alibi*. He outlined that he never went to the crime scene and that on the date and night of the alleged offence he was at his residence with his wife and family.

He outlined that he did not know any of the co-accused save for 4th accused whom he knew as a commuter omnibus driver whose commuter bus plied the City/Mbare route. The 4th accused also used to frequent the accused's neighbourhood where his motor vehicle would be repaired.

The accused attributed his arrest to the mere fact of his association with 4th accused whom police came to look for in the Mbare area. The accused had no knowledge of any criminal activity which the 4th accused could have been involved in and neither was complicit in them.

State case

The prosecutor sought admissions from the accused's counsel in terms of s 314 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] of the evidence of witnesses Dr James Hakim who certified the deceased dead at Parirenyatwa Hospital, Memory Mutakuragumbo who conveyed the deceased's body to Parirenyatwa Hospital mortuary and Detective Sergeant Chimhou who took photographs as doctor Estrado carried out a post-mortem of the deceased's remains. The admissions were duly made hence dispensing with the need for the prosecutor to lead formal evidence on the issues arising from their evidence.

The State led *viva-voce* evidence from a number of witnesses starting with Tirivacho Mbizi. His evidence can be summarized as follows:-

He is a member of the Zimbabwe Republic Police attached to Police Protection Unit. He was duty guard at the deceased's residence on the night of the commission of the offence or break in into the residence. The residence was a police guarded residence on account of the deceased being married to a government Minister who was entitled to police guard. The deceased's wife was Minister Misihairambwi-Mushonga.

The witness testified that the deceased was in good health. He was in the guardroom situated by the main gate within the yard. Around 9:00pm his superiors made their rounds to check if all was in order. Around 10:00pm he heard voices of people conversing by the gate outside. He opened the gate to check on the people but did not see them as they were by a small road which passes by the house and it was dark. The witness returned to the guardroom. After a short while he walked round the yard to check if all was well before returning to the guardroom where he sat by the heater to warm himself.

A few minutes later the witness heard sounds of movements of moving feet outside the guardroom but within the yard. He went out of the guardroom to investigate only to be surrounded by 6 men. He noticed one of them pointing a fire-arm at him. The witness was attacked by the gang and disarmed of his guard fire-arm an A-K 47. The gang took away the fire-arm, 2 magazines and the witness's phone, a Motorola type cellphone handset. He was severely assaulted with iron bars on his head and hands. The gang also took his handcuffs and handcuffed him with his hands in front of him. He thought that all the assailants participated in assaulting him. He was dressed in police riot gear. The gang enquired whether the witnesses colleagues from his workplace would come and he responded that he was not sure. One of the assailants boasted that even if the witnesses' colleagues came by, the gang would shoot them. Another gang member said that the witness should not be treated with kid gloves and that the witness should be assaulted so that he provides information on what they wanted.

The witness was then assaulted in the rib area as he was lying down on the ground. He testified that he lost consciousness and when he recovered consciousness, he found himself in the cottage tied up with others. There was a person standing guard. When the witness opened his eyes he was kicked in the eye area by the assailant standing guard. The witness said that he still carries an injury from the assault in the eye. The other gang members came and demanded that he should show them how to open the gate. The witness told them how to do so. The gang then went away leaving the witness and other workers namely Trust, Gogo Mariah and Evelyn still locked up in the workers cottage. He then drew closer to Trust who

managed to remove the handcuff keys from the witness pockets and unlocked the handcuffs. The witness then untied the other workers.

The group then broke open the door to the main house as it had been left locked. They entered the house and found the deceased lying on the bed bleeding profusely. He was conscious and asked where the people who had assaulted him had gone to. The witness and the deceased were taken to Parirenyatwa Hospital as they were badly injured. The witness was discharged after a day in hospital. He said that his guard fire-arm was recovered in circumstances he does not know but he was called to police homicide department where he managed to identify the fire-arm. He identified a fire-arm in court with serial No 2655 which number he could not properly identify as he said that the serial number is normally to be found on the dust cover. However, the dustcover was no longer attached to the fire arm. The fire-arm was produced as exh 1 through the witness. The witness could not identify any of the assailants. The witness noted that the assailants were putting on jackets, coats and warm clothing as it was cold and in winter.

Under cross examination by counsel for accused 1, the witness confirmed that he could not identify the 1st accused as one of the gang members. He was questioned on the serial number of the rifle and he noted that the numbers which were on it were 2653 and not 2655. He said that he could not see properly. He agreed that he could not testify as to how the deceased was assaulted inside the house.

Under cross examination by accused 2's counsel the witness said that his opinion that the deceased was in good health was based on his observations of him from outwards. He agreed that a person can outwardly appear healthy when he is not. He said that the cottage in which he was locked up with other workers was dark and the source of light was from outside and they were no curtains. He said that Mariah Mandizha had emerged from the main house with the assailants when they came to demand information on how to open the gate. The witness confirmed that he could not identify the 2nd accused as one of his assailants.

Under cross examination by counsel for accused 4, 5 and 6 the witness confirmed that he could not identify them as assailants.

Asked by the court to clarify the issue of the serial number of his stolen guard rifle, the witness said that the correct serial number was 2653. He was sure that the rifle which he was shown by police homicide was his guard rifle stolen from him on the night of the incident. He said that the gang stole the Minister's motor vehicle and left in it. He did not know how the vehicle keys were accessed by the gang and said that Maria Mandizha would

know better. He also said that Evelyn and Trust were tied with ropes on their hands. On being questioned by counsel on matters arising, the witness maintained that he identified the fire-arm through serial numbers and that the numbers are also recorded in police books and the person taking charge of the fire-arm signs for the fire-arm in police records.

In the view of the court the witness gave his evidence well and conceded that he could not say that any of the 6 accused persons were his assailants. The gravamen of the evidence of the witness does not lie in the identification of the accused persons. The materiality of his evidence lay in proving that there was an armed robbery at the deceased's residence on night of 18 June, 2009. The robbery was preceded by an unlawful entry into the property by the assailants. The assailants assaulted the witness and the deceased and in the case of the witness, he was assaulted with iron rods, kicked in the ribs and in the face. He was forcibly disarmed of his service rifle and 2 magazines. His handcuffs were taken from him forcibly and he was handcuffed in them. Other domestic workers were similarly rounded up, tied up and locked in the cottage. The gang drove off in the deceased's wife's vehicle. They therefore stole the vehicle and the witness' Motorola phone handset. A bloodied Dr Mushonga was found lying on his bed and him and the witness were conveyed to Parirenyatwa hospital for medical attention. The court was therefore satisfied that the events as testified to by the witness indeed occurred. Not surprisingly, counsel for the accused did not have much to dispute in cross examination given the denial of involvement by the accused persons.

The prosecutor next called Mariah Mandizha who said that she was sister to the deceased. She testified that the deceased on the fateful day came from work and the two of them conversed by the fire place before the deceased went upstairs to his bedroom around 10pm or 11pm. He asked the witness to call Trust so that he would switch on the television and tune it to Cable News Network (CNN). When the witness went to the cottage to call Trust, she was held from behind and when she turned round to see who it was she saw a person in a green shirt and thought that it was a policeman. She thought that the person was officer Moyo who had come for duty because the person's complexion was similar to that of Moyo.

The witness called out to the officer at the guard room but was ordered to shut up or risk death. She saw that the person ordering her to shut up was armed with a firearm. The person hit her on the mouth and she lost some teeth. She showed the court the missing teeth. The assault on the witness took place by the door to the workers cottage where Trust stayed. There was a stove on the veranda of the cottage. Other gang members joined the person who

had assaulted her. She said that they were 6 or 7 gang members and they would poke her and others in the eyes so that they would not be identified. She was shepherded into Trust's room where Trust and Evelyn were tied with ropes. The gang members then, "said take away the child of this place," in reference to the witness.

The witness asked why she was being assaulted and the person assaulting her replied that they wanted money. She said that the person she properly recognized was the one who held her because she saw him for 30 minutes. She said that the person said that the place was a field of money. She offered \$6.00 which was in a room in the cottage where a child was sleeping. The person took the money. She then saw a pool of blood by the guardroom as she was being moved around. She then realized that the guard had been disabled. She said that she was being assaulted with a rifle and the gang members were shouting vulgar imprintable words concerning the witness' mother. In the course of the ordeal there was a time when she was made to lie on her belly.

The witness was force marched into main house and up the stairs into the deceased's bedroom. The deceased was seated on the bed with his feet rested on the floor. The deceased asked the witness what had happened to her and who the 6 or 7 people she came in with were and what they wanted. The gang members responded that they wanted plenty of money because they had come to a field of money. When the deceased responded that he did not have money, he was struck on the head with the butt of a fire-arm and suffered a cut. She said that all the assailants then assaulted the deceased indiscriminately. The witness prayed to her ancestors that she and the deceased were about to join them, meaning that the two were about to be killed.

The gang members asked the deceased how many children he had and he responded that he had 8 children. They demanded that he should give them money if he wanted to live. The witness was taken to every room and the gang demanded to know if the rooms were occupied. In one of the rooms there was Mitchel, a sister to the deceased's wife who had visited from England. They knocked and when she opened the door she was dragged outside the bedroom by her hair into the deceased's bedroom. She was assaulted and made to lie on the floor together with the witness. The deceased was now unconscious. The witness and Mitchel were trampled upon on their backs and the witness said that she still has not recovered from back injuries. She also cannot eat properly on account of the loss of her teeth. There were threats made to kill the witness, Mitchel and the deceased but one of the gang

members dissuaded the one who had made the threat to kill the trio. One of the gangsters fired a round from the fire-arm in the middle of the house.

The gang then force-marched the witness after demanding keys to the vehicle outside. She gave them the keys to the Toyota Prado vehicle. The keys were in a cabinet downstairs. The vehicle had no registration plates as it had just been delivered two days back. The witness was taken to the cottage where the 1st witness and other domestic workers were held captive. She was again made to lie on her belly. The gangsters removed ammunition from a fire-arm and took the bullets with them saying if anyone enquired about them, he should be told that it was the assailants who took the bullets.

The witness returned to the deceased's bedroom and noted that cellphones had been stolen. The accused, the witness and the police guard were driven to the hospital by Michel. The witness stated that she suffered a stroke as a result of the ordeal. The deceased according to the witness never really recovered and passed on whilst the witness was still hospitalized. The witness identified third accused as the person who initially held her and assaulted her. Asked by the prosecutor how she was sure that it was 3rd accused, the witness said that she knew that it was the 3rd accused because "it was all in God's hands". The witness is now on high blood pressure treatment since the ordeal. She frequently loses her voice and suffers pains in her heart.

Under cross examination by counsel for accused 1, the witness stated that she did not identify the 1st accused on the day in question as she did not see his face. She however said that she remained certain that the 1st accused was involved. She agreed that she had not seen nor known the 1st accused prior to the date of the incident. She also confirmed that at the first trial, she had testified that the deceased had malaria. She said that the fire-arm from which the ammunition was removed was placed against the wall. She did not know what became of it after she was force-marched out of the room.

Under cross examination by counsel for accused 2, the witness stated that she saw the 2nd accused though she admitted that she did not see his face. She was reminded of her testimony in the aborted trial where she was recorded as having stated that the gang members asked if Tsvangirai had come to the house and further that they had also said that they had been sent by the old man, Mugabe. She testified that she had left out that portion of her evidence in her testimony.

Under cross examination by counsel for accused 3, the witness testified that she had not met or known accused 3 prior to the night of the incident. She insisted that she observed

the 3rd accused during her ordeal for 30 minutes. Her eyesight was fine prior to the assault. The witness was asked to state the physical features by which she identified the 3rd accused by. She responded that she observed his complexion and that even if she were to die, she would know the 3rd accused. She said that the 3rd accused was short to medium and stout. She could not identify the features of other assailants. She insisted that she observed the 3rd accused as he tormented her for 30 minutes. She said that visibility was by the aid of two lights and was good. She denied the suggestion that she had been invited to an identification parade and failed to identify the 3rd accused. She denied that she was only pointing out the 3rd accused because he was in court.

Under cross examination by the 4th accused's counsel, the witness was asked if she saw the 4th accused on the night in question. She responded that she did not see him but insisted that he was present. When it was put to her that the 4th accused would deny involvement the witness responded by pausing a question. "So what are we doing here?"

Under cross examination by accused 5's counsel, the witness was asked to confirm that the assailants tried their best to disguise their identities and she raised her hand and said "I raise my hand to confirm that". Asked whether she saw accused 5, she responded that she did not see his face but that they came together to the residence. Asked what evidence the witness had to prove that the 5th accused was present she insisted that he was present and stated that she relied on God for her answers.

Under cross examination by accused 6's counsel on whether the witness saw the faces of the assailants, she responded that she only saw the face of one. When it was put to her that she could not identify the assailants, the witness responded that counsel was shielding them. When it was put to her that the 6th accused would deny committing the offence she responded that he was there and treated the deceased's home as his own. She added that there was no need for the accused to deny the charges since the deceased who was assaulted was no more.

Under further cross examination, the witness testified that she did not see what became of the fire-arm from which the magazine with 30 bullets was removed. She never saw it after that.

The court put some questions to the witness to clarify aspects of her evidence. She was asked to clarify how she was positioned in relation to 3rd accused whom she claimed to have identified. She responded that she was held by her jersey and was standing facing the 3rd accused. She went on to repeat that the 3rd accused stated that he wanted a lot of money and that she responded that she only had \$6.00. She told him that the money was in a court bed

where a child called Anita was sleeping. The witness said that the 3rd accused went to the court bed and took the \$6.00. The witness was also asked to clarify how many guns she saw and she said that she saw the one which was against the wall and the one which was used to assault her. She did not actually see the accused taking the money but she discovered that the money was no longer where it had been after the assailants had departed. The witness repeated that the 3rd accused wore a police apparel of which the shirt was green. The court asked the witness to confirm whether she agreed that she could not identify the other 5 assailants facially and she confirmed so. She said that her basis for insisting that the 5 accused apart from accused 3 were part of the gang was based on her conviction that they were the ones. Counsel for 3rd accused in questioning the witness on matters arising suggested that the witness was mistaken as to issues of identification to which the witness responded that whilst this could be so, she was not mistaken about her identification of accused 3.

The court observed that the witness was of advanced age. She was understandably emotional because not only was she a victim of assault herself but she endured the agony of observing the deceased who was her brother being subjected to a brutal attack. The witness occasionally broke down in tears when testifying and the court had to appeal to her to compose herself. In assessing her evidence the court will consider that the witness would have a motive to want to see the conviction of the accused. The court will consider that despite her expected interest in seeing to it that what she considered as justice be done, she nonetheless did not go out of her way to seek to implicate the accused persons save for accused 3. Indeed the witness conceded that she did not identify any of the other assailants facially nor by any other distinguishing features although she insisted that despite such concession, the accused persons were involved. In the court's assessment of the demeanour and content of the witness' evidence, the witness was otherwise clear on her narration of what transpired. The court also considered her evidence against the other factors which could affect its reliability such as the mobility of the happenings, fear induced by assaults and threats and the overt acts by the assailants to ensure that they concealed their identities.

The next state witness was Tendai Nzirawo. He testified that he was a police officer with Zimbabwe Republic Police attached to C.I.D Homicide where he has been stationed for 7 years although he has been a member of the force for 20 years. He knew the accused persons only in connection with the case before the court. The witness was part of the team of police details who arrested the accused persons. He followed up with his team on information

relating to a Nokia 2630 cellphone handset allegedly stolen from the crime scene (the deceased's residence). They followed up on the information and traced the phone to one Chipo Barangwe in Epworth. This was on 22 July, 2009. Chipo Barangwa in turn admitted to having acquired such a phone from the 1st accused but had since returned it to him. The 1st accused was admitted at Parirenyatwa and the witness could not gather any meaningful information from the 1st accused owing to his condition.

On the following day on 23 July, 2009 the team proceeded to Epworth and arrested 2nd accused. They searched his place of abode and recovered an HTC cellphone handset which was later identified by the deceased wife, Misihairambwi Mushonga as having been stolen from the deceased's residence during the robbery herein. The witness team enquired from 2nd accused about the fire-arm which had been stolen from the deceased's residence whilst in the custody of the police guard. The 2nd accused led the police team to 3rd accused whom the 2nd accused alleged was in possession of the fire-arm. On 25 July, 2009 the team was able to arrest the 3rd accused. The 3rd accused in turn led the team to 4th accused in Mbare. The 4th accused was arrested together with 6th accused. The 4th and 6th accused then led the team to 5th accused who was then arrested in Epworth on the same day, the 25th July, 2009. The 5th accused led the police team to Kahari Village Chief Chinamora where the 5th accused had alleged that him and 3rd accused had hidden the fire-arm.

The police team then drove to Kahari Village with accused person 2, 3, 4, 5 and 6. 1st accused was hospitalized and was not part of the group. The police were led by 3rd and 5th accused persons to a bridge along Domboshava Road where the said 3rd and 5th accused person had hidden the fire-arm. The A.K rifle serial no ZRP 2653 was recovered as a result of the indications by 3rd and 5th accused person. The rifle had no magazine. The fire-arm was positively identified as the one stolen from the deceased's residence during the robbery in issue herein.

The witness testified that on 30 July, 2009 following the release of 1st accused from hospital, the 1st accused led the police team to one Kalos Zimowa from whom the nokia 2630 handset stolen from the deceased's residence was recovered. The phone had been given or sold to Kalos Zimowa by the 1st accused. The deceased who was still alive then identified the phone handset as belonging to him and as having been stolen from him in the course of the robbery.

The witness further testified that when the fire-arm exh 1 was recovered, it was under a bridge wrapped up in a jacket. The accused persons 2-6 were driven by the police team in

two motor vehicles to the place of recovery of the fire-arm. The 3rd and 5th accused were said to be the ones who voluntarily indicated the place where the fire-arm was hidden. The Nokia 2630 and HTC phones were not produced in court. The witness indicated that the same were produced in the aborted trial before CHATUKUTA J which was abandoned following the death of an assessor. The Registrar reportedly misplaced the phones as reported by the Registrar. The witness denied assaulting any of the accused persons. When he was asked to explain the circumstances under which the 1st accused ended up at Parirenyatwa hospital and the shootings of the 3rd and 4th accused, the witness responded that his explanation regarding 1st accused would result in him giving evidence on the accused's character. With respect to the shooting of the 3rd and 4th accused persons the witness did not have personal knowledge of the circumstances since another team took over further investigations and he understood that the 3rd and 4th accused had been shot when they attempted to flee from the police team which took over investigations.

Under cross examination by counsel for 1st accused, the witness admitted that he did not witness the deceased identify the Nokia 2630 as this was done by the investigating officer. When it was put to him that he had no evidence that the 1st accused was part of the gang which committed the robbery at the deceased's house and carried out assaults on the occupants, the witness responded that he did not have evidence of the 1st accused having been in possession of the fire-arm save that other accused persons involved in cases where the fire-arm was used implicated the 1st accused as part of the gang. The witness was also cross examined on matters which elicited evidence connected with the use of the fire-arm and the 1st accused's conviction over other cases. The court will not however place reliance on the evidence as it may prejudice the accused. Counsel should always be careful in cross-examining a witness to avoid questions which may end up soliciting prejudicial evidence to his client's case.

The witness testified under cross examination that the Nokia 2630 cellphone was recovered from one Caroline Zihoya on the indications of the 1st accused after his release from hospital. He admitted that when the cellphone was recovered this was done by other members of the police. He however maintained that the 1st accused had led him to Caroline Zihoya as the person whom he had given the phone to. He said that if the accused then further led the police to Richard Musongwe, he was not involved.

Counsel for 2nd accused cross examined the witness at length. The witness testified that the 2nd accused was connected to the robbery in question through the HTC phone handset

recovered from him. 2nd accused also led the police to 3rd accused who in turn led the police to the recovery of the fire-arm exh 1. The witness only connected the 2nd accused to the offence after the deceased's wife had identified the HTC phone. He was asked which police officer made the actual recovery and the witness responded that it was Sgt Milward who then recorded the details of the phone for the accused to sign although he could not recall if the 2nd accused signed. The witness maintained that the HTC phone was recovered from 2nd accused and that the 2nd accused led the police to 3rd accused.

Counsel for 3rd accused in cross examination asked how the 3rd accused was arrested. The witness responded that the 2nd accused led them to the 3rd accused's place and they did not find the 3rd accused but his young brother. The young brother then assisted the police to locate the whereabouts of 3rd accused. The 3rd accused was subsequently arrested within Epworth area as he was walking along a road. The witness stated that on arrest, the 3rd accused person was advised of the allegations or charges being made against him. He stated that he could not say that the 3rd accused was advised of his rights as provided for under the current Constitution because it was not yet in existence in 2009. The witness said that the 3rd accused was arrested after 2 days post the commission of the offence. The 3rd accused when asked about the A.K rifle stolen from the deceased's residence led the police to the 4th accused.

The witness denied that he was the one who shot the 3rd accused. He however admitted that the 3rd accused was shot by another team of police who took over investigations. Asked how the fire-arm exh 1 was recovered, the witness testified that the 3rd accused was in the leading vehicle and they first went past the bridge where the fire-arm was recovered. The 5th accused then indicated that the 3rd accused had mistakenly gone past the place and it was 5th accused who pointed out the correct place where the fire-arm was hidden. The witness denied that the case was a high profile case on account of the personalities involved but that it was a high profile case to the police because a fire-arm was on the loose.

Counsel for 4th accused asked the witness how he linked the 4th accused to the offence. He testified that 3rd accused led the police to the arrest of 4th accused at house No. 2 Vito Street which place was the 6th accused's residence. No exhibits were recovered from the 6th accused's residence upon the arrest of 4th accused. However, the witness testified that the 4th accused led the police to the 5th accused in Epworth. The 4th accused had alleged that the 5th accused had the fire-arm. The witness disputed that the 4th accused was shot upon arrest but after the recovery of the fire-arm. He denied that the 4th accused was force marched to

Epworth and added that he could not have force marched the 4th accused to a place he did not know nor to 5th accused whom he equally did not know. The witness agreed that apart from the fact that 4th accused led the police to the 5th accused who in turn led to the recovery of the fire-arm, the witness did not have any other evidence to connect the 4th accused to the robbery at the deceased's residence.

Under cross examination by counsel for 5th accused, the witness agreed that the only evidence he had to connect the 5th accused to the offence was the fact that he was implicated by 4th accused and that the 5th accused after his arrest led police to the recovery of the fire-arm exh 1. The witness testified that the 3rd and 5th accused persons signed in his diary that they had led the police to the recovery of the fire-arm. The witness could not recall whether the accused persons were warned and cautioned prior to making indications. He recalled that the accused persons were asked where the fire-arm was and they volunteered to indicate the place of its recovery. On the details of recovery of the fire-arm, the witness said that the vehicles in which the 3rd and 5th accused were being conveyed were stopped and the two of them led police to the place where the fire-arm was hidden. The witness denied that the police stage managed the indications.

Under cross examination by counsel for 6th accused, the witness admitted that there was nothing recovered from the 6th accused and neither did the witness have any other evidence to link the 6th accused to the offence.

The prosecutor next led evidence from Caroline Zihoya. She testified that she only knew 1st accused whom she had a chance meeting with in June, 2009. She had bought a nokia 2630 from one Richard Musongwe around 28 June, 2009. The accused enquired from her whether she had bought the phone from Richard Musongwe since he, the accused previously owned the phone and had sold it to the said Richard Musongwe. The witness was visited at her workplace 2 or 3 weeks later by police and they recovered the phone from her alleging that it was subject of their investigations. She never saw the phone thereafter.

Under cross examination by counsel for 1st accused, the witness corrected herself that she told the police that she bought the phone from Richard Musongwe on 18 June, 2009 and not 28 June, 2009. She attributed the variance to time lapse. She also confessed that she was a bit confused on specifics of dates. The witness said that she had not seen many phone handsets like the 2630 which she bought from Richard Musongwe. Counsels for 2nd -6th accused persons had no questions for the witness in cross examination. Under re-examination the witness said that she could not commit herself to exact dates but was certain that the

month she acquired the phone was June, 2009. When asked by the court why it appeared that she had a friendly talk about the phone with 1st accused and yet she was meeting him for the first time, the witness responded that at first she panicked and thought that the 1st accused wanted to grab the phone from her until she realized that he did not have an evil intent.

The court also asked the witness how she was sure that 1st accused person was the person she had engaged in conversation with over the phone. She responded that she met the 1st accused during day time between 1-2 pm, when she was coming from church. They conversed for about 5 minutes and she noted his complexion. She also said that she recognized the 1st accused when he was in the company of the police when they came to her workplace to recover the phone. She then told the police about the chance meeting which she had encountered with the 1st accused. The police had asked her whether she knew the person who was in their company in reference to the 1st accused and she admitted so.

On questions arising, counsel for 4th accused asked the witness to narrate the content of the conversation which the witness engaged in with the 1st accused. She responded that the 1st accused had said, “My sister how are you? The phone you are holding, did you buy it from Richard. I confirmed so. I asked him why he had asked. He said it used to be mine. He went away.”

After the evidence of this last witness the prosecutor sought admissions of the evidence of witnesses Anesu Samhembere and Priscilla Misihairambwi Mushonga as set out in the summaries of their evidence as detailed in the addendum to the State summary. The gist of the evidence of Samhembere was to the effect that he worked for the Ministry of Industry and Commerce which was headed by Priscilla Misihairambwi Mushonga in 2009 as Minister. In February 2009 he booked an HTC cellphone handset allocated to Minister Mushonga with serial No. 829GC00963 in the Ministry records. The witness identified the same phone on 24 July, 2009 by its make and serial number when it was shown to him after its recovery by the police. The gist of Priscilla Misihairambwi Mushonga’s evidence was to confirm that the HTC cellphone handset referred to by Samhembere was allocated to her as government Minister and that it was stolen from her husband the deceased on 18 June, 2009. She identified the phone on 24 July, 2009 at CID Homicide Harare offices. The defence counsels for all the accused admitted the evidence as outlined in terms of s 314 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*].

The State called Joshua Muzanago, a detective inspector with CID Homicide who testified that he had been in the force for 25 years and has been attached to Homicide Section

for 7 years. He is the investigating officer. He did not know the accused persons nor the deceased prior to the case. He got involved in the case following the arrest of the accused persons in connection with a robbery which had taken place on 18 June, 2009 at 2 Crackley Lane, Mount Pleasant, Harare.

When asked to outline the investigations which he carried out, the witness testified that the investigations were a mammoth task and several teams were set up. Information was received that a stolen phone Nokia 2630 was being used by Chipo Barangwe. She was located and confirmed that she had used the phone after it had been given to her by her boyfriend the 1st accused. The 1st accused had however taken back the phone and sold it to Caroline Zihoya. Another team arrested 2nd accused and recovered an HTC phone which was identified by Minister Mushonga and Samhembere as a government issue phone which Minister Mushonga further confirmed as the one which she was issued with.

The witness testified that during the course of investigations, one victim of the robbery who is now the deceased in this case Christopher Mushonga died on 15 August, 2009. This necessitated the alteration of the charge which the accused persons herein had been facing from robbery to murder. By this date, the witness testified that the fire-arm stolen from the deceased's residence had been recovered on indications by the accused. The witness was not part of the recovery team. He testified that a Nokia 2630 also stolen from the deceased's residence was recovered and identified through its serial number by the deceased before he passed on. The witness identified the fire-arm exh 1 in court. As regards the two cellphone handsets, he said that they were booked in the exhibit books at court here but were reportedly misplaced. It is necessary for the court to just pause at this juncture and warn the officers who handle exhibits to be always alert and not slack in their duties. Exhibits should be kept safely. It amounts to dereliction of duty for the exhibits officers to lose exhibits or fail to account for them. In this case, the exhibits being valuable, one cannot discount outright theft of the same. This should be deprecated.

The witness confirmed that the 1st accused was connected to the offence through the recovery of the Nokia 2630 phone stolen from the deceased's residence. He also stated that 2nd, 3rd and 5th accused implicated the 1st accused. The 2nd accused was connected to the offence through the HTC phone recovered from him. The 2nd accused allegedly led to the arrest of the 3rd accused person who in turn implicated 4th accused. The witness repeated the same evidence of arresting officers regarding the linking of the accused persons to the offence and no useful purpose will be served in repeating his evidence in this regard.

The witness also agreed that some accused persons had been shot during attempts to escape when police were investigating other cases in which the fire-arm exh 1 was used. The court was mindful that such evidence could be prejudicial to the accused and warned itself to disregard it. The witness however was clear in his evidence that the accused persons were not shot in connection with the present case. The witness was taken to task over how the Nokia 2630 had been identified by the now deceased. He stated that although the now deceased was unwell, he identified the phone through its serial number which was inscribed on the box in which it was contained when bought. The witness was reminded that at the first trial the witness had stated that the Nokia 2630 was taken from Evelyn Chihuri. The witness said that it was a time issue and that he could be mistaken. It however appears to this court that it does not really matter whether the phone was in the hands of Evelyn Chihuri or the deceased. What is critical is to consider whether the phone in question was stolen or removed from the deceased's residence during the robbery.

The witness confirmed that the HTC phone was identified in the witness' presence by a Ministry official. He stated that he saw the place in Nzirawo's note book where the 2nd accused signed for the recovery of the HTC phone. With respect to identification of the fire-arm, the witness identified its serial No 2653 and said that he checked with the police armaments records and confirmed that the same had been issued to Mbizi, the 1st witness, who was robbed of it.

Under cross examination by the counsel for 3rd accused, the witness stated that he did not find any evidence to connect the 3rd accused to the offence other than that he was implicated by the 2nd accused. The 3rd accused also led to the arrest of the 5th accused and the 3rd accused had knowledge of where the fire-arm was. The witness could not comment on how the 3rd accused came to be shot as he was not there. He said that indications leading to the recovery of the fire-arm were not video recorded because of logistical problems given the distance which the police team had to transverse with the accused persons. When asked whether the accused persons could have possessed the cellphones in issue as secondary possessors, the witness responded that the accused persons had not mentioned so. Again counsel for 3rd accused put questions to the witness which solicited responses concerning the 3rd accused's involvement in other cases. The court will disregard the evidence. Counsels as already noted need to be very careful that when soliciting evidence, they do not solicit evidence which may be detrimental to their client's causes.

Under cross examination by 4th accused's counsel, the witness stated that several teams were constituted by C.I.D homicide to deal with the investigations as there were several cases under investigations. However, with regards the case in *casu*, the witness was in charge and the teams involved reported their findings to him. The witness said that the 4th accused was implicated by the 2nd accused as part of the gang.

Accused 5's counsel cross examined the witness. The witness stated that the 5th accused admitted to having been involved and led police to the recovery of the fire-arm. The witness was not present when the fire-arm was recovered. He was asked whether the 5th accused was interviewed about the case *in casu* and he responded that the 5th accused had admitted to the robbery. The witness is not the one who recorded a warned and cautioned statement from the 5th accused. The cross examination of the witness by the 5th accused's counsel was not very eventful and it solicited evidence of what the arresting detail had already told the court.

The 6th accused's counsel also cross examined the witness. The cross examination was not eventful because the witness admitted that he had no other evidence to implicate the 6th accused save his being mentioned by the 3rd accused.

The state counsel next produced the post mortem report on the examination of the deceased's remains by consent as exh 2. Also produced by consent was exh 3 being a report by the Registrar of this court. The post mortem report was carried out by Doctor Eurado Estrado after examining the remains of the deceased. The material indications on his report following an internal examination of the body were that he observed subgaleal hemorrhage of the right side parietal bone and brain aedema. He concluded that the cause of death was cardiac failure, hemorrhage, pulmonary oedema due to assault. In short therefore the deceased died as a result of injuries suffered and complications which followed and these were secondary or due to assault.

With respect to exh 3, the Registrar reported that the duty registrar received the exhibits on 25 October 2010 being the HTC cell phone and Nokia 2630 with serial numbers respectively 35661001472358 and 359575/01449159. The exhibits were produced during the aborted trial of the accused persons herein. However, the Registrar could not now locate them. They were obviously lost in the custody of the Registrar. The court has already commented on the need for exhibits to be kept with care.

The state closed its case whereupon all counsels except for accused 5 indicated their instructions to apply for discharge at the close of the state case. Counsel proposed to file

written submissions in this regard and the request was granted. Written submissions were filed by counsels for 1st, 2nd, and 6th accused persons. 3rd, 4th and 5th accused persons capitulated and opted to proceed in their defences. The decision by the three to capitulate was well informed because evidence had been led that they *inter alia* led police on indications leading to the recovery of the fire-arm. They did not deny that they went on indications. They however put it to the state witness that the indications were stage managed and forced by the police. 3rd accused's position was even more understandable in view of the evidence of Maria Mandizha that she was positive about his involvement and presence at the scene of the robbery.

The state counsel withdrew charges after plea against the 6th accused. The decision was in the view of the court properly advised because even the police witnesses in their testimony did not have any other evidence to connect 6th accused to the offence other than that the 4th accused person mentioned his name. The 6th accused was accordingly discharged at the close of the State case and a verdict of not guilty was returned.

The applications by the remaining accused persons were dismissed and the court indicated that the reasons for doing so would form part of the main judge. The brief reasons for the dismissal of the applications were that the 1st accused was linked to a Nokia 2630 cellphone stolen from the deceased's residence in the course of the robbery. He had to refute the evidence of independent witnesses who implicated him in its movement to him.

The 2nd accused was allegedly found in possession of the HTC cellphone which was also stolen from the deceased's residence in the course of the robbery. It was also alleged that the 2nd accused implicated 3rd accused as having knowledge of the whereabouts of the fire-arm exh 1. The 2nd accused needed to explain his possession of the HTC cell phone and to refute allegations made that he implicated the 3rd accused.

The application for discharge at the close of the State case is a procedure provided for under s 198 (3) of the Criminal Procedure and Evidence Act. In short the law provides or obliges the court to discharge the accused on the charge he is facing or any offence he might be convicted on that charge if there is no evidence led by the prosecution that the accused committed the offence. The exposition of the approach which a court will adopt was authoritatively set out by GUBBAY CJ in *S v Kachipare* 1998 (2) ZLR 271 (SC). The learned Chief Justice stated that:

“...there is a sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where:

- (i) there is no evidence to prove an essential element of the offence: see *Attorney-General v Bvuma & anor* 1987 (2) ZLR 96 (S) at 102 F-G.
- (ii) there is no evidence on which a reasonable court, acting carefully, might properly convict. See *Attorney-General v Mzizi* 1991 (2) ZLR 321 (S) at 323 B;
- (iii) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it; see *Attorney-General v Tarwirei* 1997 (1) ZLR 575 (S) at 576 G.”

The court, and for purposes of clarity, the judge, myself who must determine the application for discharge could not understand the rationale for making the applications where clearly evidence had been led implicating the 1st and 2nd accused persons through not only police but civilian witnesses who identified that the deceased and his wife’s cellphones had originated from them. It was common cause that the deceased was assaulted in a robbery and evidence was led that property including the phones whose possession the 1st and 2nd accused had to explain were stolen during the robbery. The applications were therefore not well advised or informed. I therefore dismissed them. It should be emphasised that s 198 (3) should not be abused or used as fishing expedition to test the waters. It is intended to protect the accused from being made to answer to a case which has not been established. A case is not established if the factors outlined by GUBBAY CJ (*supra*) are manifest at the close of the State case. It is not expected in any event that a prosecutor doing his duties properly would seek to proceed with a prosecution in which it is clear that he has not led any admissible evidence to link the accused to the commission of the offence. Applications under s 198 (3) ought to be rare or the exception rather than the norm because the presiding officer expects the prosecutor to throw in the towel where he has failed to adduce evidence that the accused committed the offence charged. The prosecutor *in casu* and to his credit was advised to and conceded by withdrawing the charge against the 6th accused. Such approach is commendable as being professional and refreshing as it shows that the prosecutor was appreciative of his role in the dispensation of justice.

The trial proceeded to the defence case with the 1st accused taking to the witness stand. He testified that he sold fuel for a living and was a married person with 3 children. He said that he resided in Prospect Waterfalls. He did not recall where he was on 18 June, 2009 but believed that he must have been at home since he usually was at home by 8:00 pm. He did not know any of the accused person save for the 2nd accused whom he knew to be residing in Epworth in the area as the 1st accused’s grandmother. He was arrested on 8 July, 2009 in Epworth where he had visited his grandmother who was unwell. He testified that the

police came to his residence around 2 am and were looking for a person called Mike. In their exchanges with the 1st accused's grandmother, she enquired as to who was knocking at the door. The persons knocking at the door then identified themselves as police officers. They forcibly opened the door and ordered every male person to come out of the house. The 1st accused and his 15 year old uncle went out of the house. The police then just started to assault him without saying anything. When he asked them why they were assaulting him, one of them just shot him 4 times on his right leg. The shots hit the 1st accused below the knee, on the thigh and on his buttocks.

Immediately after the 1st accused had been shot he said that 3 vehicles arrived at the scene. The police ordered a person who was in one of the vehicles to alight. They asked that person whether the 1st accused who lay on the ground was Mike but the unnamed person could not say whether the 1st accused was Mike. The police then handcuffed him. He was not told why he was arrested. They bundled him into one of their vehicles. They only told him later that he was a suspect in a case of robbery committed in Highlands. He testified that he was however tried and acquitted on the Highlands robbery case.

As to how the 1st accused was linked to the case before the court, he said that upon his arrest he had 2 cellphones. He was admitted into hospital. Police retained his phones and would receive calls meant for him. He was discharged from hospital on 27 or 28 July, 2009 and was taken by police to Harare Central Police Station where he then found 2nd, 4th and 5th accused persons and Chrispen Sibanda.

The 1st accused was surprised to be made part of their group. He was then charged for unlawful possession of a fire-arm together with his so called accomplices. He was acquitted under CRB 529/2009. He said that police went through his phone and saw a message which he sent to Richard Musongwe they asked what business he had with Richard, he said that he had transacted with him over a which over a which was a Nokia "26 something". Richard was to the 1st accused's knowledge to be found at Ximex mall. Police took him on a hunt for Richard in Sunningdale but they did not find him. He said that the Nokia phone had white and blue covers.

The 1st accused denied knowing Caroline Zihoya or leading the police to the recovery of the cellphone from her. He said that he sold a Nokia phone to Richard in May 2009 which was about month after he had bought or acquired the phone. He said that he bought the phone from his brother in law whom he did not name. The brother in law would occasionally come to buy fuel at the accused's residence. He denied that the phone could have been acquired in

the robbery the subject matter of this case because he already had acquired it before the robbery. He admitted that he once gave the phone to his girlfriend Chipso Barangwe to use. He agreed to having seen Caroline Zihoya before his arrest at Afro Foods in Mbuya Nehanda Street. He then stated that when he was taken to Afro Foods, Caroline did not know or identify him. He denied meeting with Caroline as she came from church and said that he had no interest in phones insinuating therefore that he could not have been attracted to converse to Caroline about the phone as alleged by Caroline.

The 1st accused said that he was acquitted of the robbery at the deceased's residence, the subject of this case. Regarding what happened at Afro Foods, the 1st accused stated that when the police got there with him, a girl came out without a phone. She went back into the premises and brought a phone similar to the one produced in court in the aborted trial. The police just said it's the one. They never opened it. In the late morning the police then said that the phone had been identified by the maid as having been stolen from the deceased's residence.

The 1st accused testified that if his link to the robbery was the phone, this could not be so because he already possessed the phone before the robbery. He then said that he was worried because Evelyn Chihuri in the aborted trial had testified that he could not identify the phone and so did Gift Muuye. He said that he was also worried that Richard Musongwe did not testify as a witness. The court told the accused that he was free to call Richard Musongwe as his witness since the state had closed its case.

Under cross examination, the 1st accused said that he could not deny that a robbery occurred at the deceased's residence, nor the events which took place there as per the State evidence including the theft of an HTC and Nokia 2630 cellphones. He admitted that he did not know police officer Nzirawa prior to the investigations in this case. He said that Nzirawa lied that the 1st accused knew Caroline Zihoya because he only knew Richard Musongwe to whom he sold the phone. He said that Nzirawa just wanted him imprisoned because he was making many false allegations against him which included that he unlawfully possessed a gun which was stolen yet he was in hospital.

When asked about how he acquired the phone, he changed his evidence and said that a friend of his brother in law had sold it to him. He said that he gave the police the name of his brother in law. Asked why he recalled that he acquired the phone in May, he said that it was in May that he went to South Africa and left the phone with his girlfriend.

It has to be noted at this stage that the identity of the phone as belonging to the deceased is not an issue because the 1st accused during the State case did not lay claim to the phone or allege that the phone which was produced in the aborted trial was not the phone which he sold to Richard Musongwe and was recovered from Caroline Zihoya. It was also not put to the police witnesses that the deceased had mistakenly identified the phone as his yet it belonged to the 1st accused. It was not put in issue that the Nokia 2630 was not stolen from the deceased's residence. The issue which the court will have to determine is whether the 1st accused acquired the Nokia phone from his brother in law as he stated in his evidence in chief or from a friend of his brother in law as he testified in cross examination. The 1st accused's defence outline does not mention or deal with issue of the phone.

Following on the 1st accused testimony that he had been acquitted of the charge of robbery of the fire-arm, the court asked counsel whether if the accused was so acquitted of theft of exh 1, it meant that he had already been acquitted of the robbery and whether if that was so *autre fois* acquit did not apply. The reason for the court to raise the issue was simply so that the 1st accused should receive a fair trial and also so that the court did not have to waste time determining a matter in respect of which a competent court had already made a determination. Counsels agreed that it was proper to adjourn the trial for records to be checked. After several postponements counsels for the 1st, 2nd and 4th accused persons indicated that they proposed to file applications to seek the discharge of these accused persons on the basis of *autre fois* acquit. The court allowed the filing of the applications and noted that it was proper to allow an issue of law to be raised at any stage of the proceedings.

The court considered the applications and dismissed them. The brief reasons for doing so are as follows. It is a principle of the law that a person should not be tried twice on the same offence. Section 180 (2) (d) as read with s 184 of the Criminal Procedure & Evidence provides that an accused can plead that he has already been acquitted of the offence with which he is being charged. Section 70 (1) of the constitution of Zimbabwe (2013) provides that it is incompetent to have any person tried for an offence, act or omission for which such person has previously been pardoned, acquitted or convicted as the case may be.

Counsels were generally agreed on how the court deals with such a plea. The case law cited by counsel was helpful and the court expresses to gratitude to counsel for their input. In *State v Gabriel* 1970 (2) ZLR 251 at 256 it was held "that the test must be subject to the proviso that the offence charged in the second indictment has in fact been committed at the

time of the first charge, thus if there is an assault and a prosecution and a conviction in respect of it, there is no bar to a charge of murder if the assaulted person later dies.”

It was accepted that the 3rd accused person were acquitted on two counts of robbery committed at 2 Crackley Lane, Mount Pleasant. A charge of attempted murder which would have involved the court making a determination on the assault upon the deceased was not proceeded with. It was withdrawn. The charge of murder which the accused are facing could not therefore be said to have been determined and the court agrees with State Counsel that any comments which could have been made by the court in the trial for armed robbery were obiter. The acquitting court which was the court of the regional magistrate would not have had jurisdiction to determine a charge of murder. In this regard, the judgments of this and the South African jurisdictions where similar provisions of the law are to be found are clear that for a plea as raised by the accused person to succeed there are basically three elements to be satisfied or proved.

- (i) that the convicting or acquitting court was competent to try the accused on the charge which the accused is now facing.
- (ii) that the trial was based upon a competent indictment good in law from which a valid judgment could be passed.
- (iii) that the acquittal was on the merits.

See *S v Paragon Real Estate & Ors* HH 35/07

S v Ndou 1971 (1) SA 668

It is clear therefore that the accused persons were never in jeopardy of being convicted of the murder or attempted murder of the deceased as the charges relating to the attack upon him were not determined or heard. Whilst the witnesses who gave evidence would be material witnesses herein, what happened was that the accused were not charged with, nor convicted or acquitted of the assault upon the deceased.

Following the dismissal of the applications for *autré fois* acquit, the 2nd accused testified in his defence. He said that he was a resident of Epworth, married with 3 children. He did not know the deceased and did not recall where he was on the night of 18 June, 2009 since he never thought that the day would ground a case against him.

Testifying on how he became involved in the matter, he stated that police just pounced on him at his home on 23 or 24 July, 2009 around 6 – 7am in the morning. They knocked at his door, ordered him outside and straightaway set upon him with switches

plucked from an avocado tree in the yard. They said nothing at all before assaulting him. When he fell down, the police stamped all over him. The police then produced a phone and showed him the picture of the 1st accused. One of the police members asked him if he knew Zeb Gwashu, Baba Maki and Charlie Mbombo. They were said to move in a BMW motor vehicle. He then confessed that he told the police that he knew them and their car as they would occasionally come to his shop. He then led police to the home of the 3rd accused's parents where he said their relatives stayed. On the way, the police stopped their car by a grave yard and asked the 2nd accused to point out the house he was referring to. Some police officers then went to the house and returned with the 3rd accused's young brother.

The police commenced a search for the 3rd accused and they telephoned for reinforcements. They returned to his homestead and carried out a search whilst he remained in the police car. He stated that they then took his phone and another one belonging to a customer. They waited for another group of police officers to arrive and Nzirawa was in this second group. The phones recovered were his Nokia 1200 and another black one whose brand he did not know. He however said that it was not an HTC. He was only shown an HTC phone at the police station, that is, the one produced in the aborted trial. He said that he denied knowledge of it.

The 2nd accused said that the police spent the day with him driving around looking for the 3rd accused. In the late afternoon he was taken to Harare Central Police Station and made to stand at a place they called a bridge. He was assaulted with sticks and knobkerries and also on his soles or feet. Over the next two days, the accused said that the police would drive around with him looking for the 3rd accused and the 3rd accused's young brother was present. The 3rd accused was however arrested by another group and he heard that he had been shot.

He denied that the HTC phone was recovered from him or his residence. He denied implicating the 3rd accused. Under cross-examination, accused 3 denied that Nzirawa was part of the police team which arrested him. It is of course noted that the denial was not put to Nzirawa to refute or admit. He said that Nzirawa lied that the HTC phone was recovered from the 2nd accused residence. He said that he could not advance any reason why Nzirawa would lie against him except that he wanted to add weight to his story. He said that he did not lead the police to the 3rd accused but to his parents' home. He denied knowledge of or being asked about an A. K. rifle nor referring police to the 3rd accused regarding its whereabouts.

Asked where he was on 18 June, 2009, he shifted positions from his earlier answer that he could not recall and said that he was attending to his business as he was self-

employed. When asked as to why he did not state that he was home in his defence outline, he said that he was only explaining what he knew about the offence. When asked whether any witnesses who testified for the State took part in an identification parade, he said that he could not recall. There was no re-examination or questions by other accused's counsels put to him. The 2nd accused's case was closed.

The 3rd accused testified in his defence. He said that he was an informal trader resident in Epworth. He was arrested on 25 July, 2009 when coming from collecting money from vendors whom he had given his wares to sell. He was arrested by police in 2 motor vehicles. They ordered him to lie down as they were armed. They handcuffed him and bundled him into one of the cars and proceeded to his house. They interrogated him in connection with a fire-arm which he denied owning or possessing. They assaulted him and asked him, about the whereabouts of Zebe and Charlie Mbombo and he told the police that the two had gone to Mutare. He told the police that the two had left a small bag and the police said that were they kept the fire-arm. He told the police that the two stayed in Mbare.

He was driven to Mbare where he showed the police the residence of Zebe and Charlie Mbombo. He denied mentioning the 4th accused. He said that he only knew the 2nd accused since people charged their phones at his place as many house have no electricity in Epworth. He denied knowledge of how the fire-arm was recovered. At Harare Central Police Station on 25 July, 2009 he said that police who were drunk asked him to sign somewhere and he refused. He was severely assaulted. He was thereafter ordered into a motor vehicle where the 5th accused was. He saw the 6th, 5th accused and Crispen Sibanda. He did not see the 2nd accused. The police drove the 3rd accused and the accomplices to some place he did not know. They were made to point to a bag which the police had recovered from the 3rd accused's premises. The police took photographs. He said that the police were drinking beer on the way to this unknown place. He said that the indications were forced and he was roughed up including being dragged from the back of the police vehicle resulting in him falling over. The police also just shot him after asking him whether he was going to refuse to do as they wanted. He heard 3 gunshots. The next he recalls was that he woke up in hospital.

Under cross examination, he said that up to this day he was puzzled why he was arrested because he has never been advised of the reason. He said that there was no fire-arm in the house when the police searched except a bag with clothes. Asked why he took police to Mbare if he knew that Zebe whom they wanted had gone to Mutare he said that the police wanted to know or see the place where Zebe stayed. He however changed testimony and said

that he led the police to Zebe's parents' house. He denied that police took him to Mbare because he had told them that the 4th accused had the fire-arm. He denied that he led the police to the arrest of the 4th and 6th accused person. He said that the police took him to a place where the fire-arm was placed and he was made to point at it. The indications were done just on the verge of the road. He did not know the place. He denied that the fire-arm was hidden under a bridge nor that it was wrapped in a jacket. Asked why police would not produce photographs of the pointing out of the fire-arm he said that they did not do so because the court would see that the fire-arm was not hidden. With regards his being shot, he said that police shot him after the indications of pointing out the fire arm.

The 3rd accused called the 6th accused who had been discharged at the close of the State case as his witness. His evidence related to indications allegedly made of the fire – arm. He said that the 3rd and 5th accuseds were made to point at a bag removed from a police car which had a fire-arm. This was done by the side of the road and photographs taken. He himself was assaulted with a pick handle as he remained in the vehicle at the scene of indications. Under cross examination he said that indications were done at an open place. Asked if he wanted court to believe that police would just remove the bag with the gun and place it by the side of the road, he changed and said that there were some trees and the bag was hidden though the trees were not tall. Asked how he witnessed indications since he was being ordered to remain prostrate in the back of the truck, he said that he would lift his head occasionally to look around. He said that 4th accused was arrested when he had come to have his vehicle fixed in Mbare. Asked by the court to clarify as to who made indications of the fire-arm, he said that it was the 3rd and 4th accused who were made to disembark and point out the fire-arm. When asked further by court to confirm as to the number of accused who were made to point out the fire-arm, he said all the four of them. As regards him and Crispen Sibanda, they were not made to point out but just beaten. Asked if he knew the place he laughed and sarcastically said it could be a game park or a dam. The court warned him to take court proceedings seriously.

The witness was clearly not serious and did not really assist the 3rd accused nor the court. Apart from being dramatic in suggesting that indications took place in a game park or a dam he also stated that he was being made to lie on the floor of the cab of the truck and the police did not want him to see what was going on. Apart from leaving the court wondering why the witness would have been taken to the scene, he clearly cannot be relied upon to have

seen what took place on his own account. His evidence did not add value to that of the 3rd accused.

Crispen Sibanda was also called to testify. He testified that upon his arrest he was made to join other accused and police proceeded to Domboshava. They travelled in an Isuzu and a Corolla. He was handcuffed to the tailgate of the Isuzu. The police assaulted Tendai Jongwe whilst he disembarked from the vehicle with the 3rd, and 5th accused persons. He said that police removed a bag with a gun from the Corolla. He said that police placed a bag at a bushy area and forced him, the 3rd and 5th accused persons to make indications. Thereafter the teams drove through a place where there had been a reported shop break in but the shop owner said that the culprits were not the accused. He denied that the fire-arm was recovered under a bridge. He said that the police had the fire-arm and placed it some 5 – 7 metres from the road before ordering that the accused person point to it. He said that of all the police officers he only knew Nzurawa. He said that the police were drunk and celebrating that they arrested criminals who had bothered them for a long time.

In cross examination the witness said that he was made to lie on floor of the truck cab was and not allowed to see what was taking place. He said that he could not dispute Nzurawa's evidence that the 3rd and 5th accused elected to make indications. He said that police were assaulting him on the way to the indications with a metal rod, Jongwe with an axe handle and both with beer bottles on their knees and elbows. Asked to reconcile his evidence with that of Jongwe who said him and the witness never made indications and that it was the 3rd and 4th accused who made indications, he said that he was being assaulted and was lying in the vehicle.

The same criticism's made with regards Jongwe's evidence apply to this witness who in addition contradicted the evidence of Jongwe as to who made indications. He also told the court that he was being subjected to assault when asked to reconcile the contradictions. The court was not persuaded to trust and accept his evidence as reliable and therefore did not it to be of any probative value.

Accused 4 gave evidence that he is a commuter omnibus owner/driver. He was arrested in Mbare on 26 July, 2009 when he had gone to see to the repairs to his omnibus which had broken down. He was just grabbed by a man and when he fought back people came and were shouting that the accused should be left alone. The person left him and as he started to walk away he was shot 3 times and fell to the ground. He woke up in hospital. He

gave evidence concerning a number of cases which he was charged for and the court will not be influenced by this evidence which his counsel should not have allowed him to adduce.

He said that he did not remember where he was on 18 June 2009 as he is a commuter omnibus driver. He denied going to the crime scene. He denied leading police to the arrest of accused 5 who had the fire-arm. In cross examination he denied that he knew any of the co-accused. He denied that accused 3 led police to his arrest because he was not arrested at home. He said that there was no way that the 3rd accused would have known that he was in the streets where he was shot and arrested. He denied leading police to the 5th accused. The 4th accused sought to resile from his warned and cautioned statement yet he adopted it as part of his defence outline. In the said statement, he alleged that by the time he knew or started being acquaintances with the 3rd accused, “the 3rd accused already had custody of the AK rifle which is the one he showed police when he was arrested.” He then agreed that he knew the 3rd accused prior to this arrest contrary to para 3 of his defence outline and his evidence in chief. When asked why he did not produce his commuter vehicle log sheet to show his alibi that he was on duty on 18 June, 2009, he said that he left it in the vehicle and did not know who took it. He agreed though that this was his best defence. He did not have any plausible explanation for not telling he police about the log book or indeed the court.

The 5th accused gave evidence. He resided in Epworth. He did not know any of his co-accused before his arrest. He said that he was at home on 18 June, 2009. He said that he operated a flea market. He was arrested on 26 July, 2009 whilst at home preparing to go to church. Police on arresting him demanded for the phone given to him by Crispen Sibanda. He responded that he had sold it. He was next bunched together with other accused and driven to some place where the police then forced him to make indications.

Upon his arrest he said that police were alleging his involvement in the theft case of a 323 vehicle in Chinhoyi. On indications he said that police produced a bag with the rifle, placed it on the ground and threatened to shoot him is he did not point at it. The bag was placed some 5 – 7 metres away from the road.

In cross examination, the accused insisted that the indications were stage managed. He said that the police did not produce the indications because they knew them to be of no value as they would exonerate the accused. Nothing of probative value came out of the cross examination.

Before the court adjourned, Counsel for the 4th accused indicated that he had made an error in the defence outline by not including the words accused ‘will not abide by his defence outline.’

In the assessment of the evidence, this was not an easy case for the police to investigate or for the prosecution to prove. There is no doubt that the deceased died from injuries sustained in a robbery committed at his house. Although there were eye witnesses to what transpired, none of them could identify the assailants or robbers sufficiently to convince the court beyond a reasonable doubt that all the 5 accused persons took part in the robbery save with respect to the 3rd accused. There is in fact therefore no direct evidence of the identity of the robbers with the exception of accused 3.

In the view of the court the case must be determined on circumstantial evidence. The celebrated case of *R v Blom* 1939 AD 188 has consistently been followed as was done in *S v Nyamayaro* 1987 (2) ZLR 222. The principles set out therein are restated as follows:

- (i) the inference sought to be drawn must be consistent with all proved facts.
- (ii) the proved facts must exclude every other reasonable inference save the one sought to be drawn, otherwise if there is doubt as to whether the inference should be drawn, then it should not be drawn.

The 1st accused was linked to the offence by virtue of the Nokia 2630 phone which was traced to him. The phone was stolen during the robbery when the deceased was assaulted. The 1st accused explanation for possession of the phone was not plausible. He purported to have obtained it from his brother in law. He then changed his evidence and said he obtained it from a friend of his brother in law. He said that he obtained it in May 2009. He did not lay claim to the phone or seek to call any evidence to corroborate how he obtained it. When an accused is found in possession of property which was stolen in an armed robbery as in this case and fails to give an innocent explanation of the possession, the only reasonable inference is that he must have acquired the property in the course of the robbery. The 1st accused did not convince the court on a balance of probabilities that he possessed the phone innocently nor that the phone produced was not the phone stolen from the deceased’s premises. The deceased was attacked during the robbery and subsequently died. The only reasonable inference is that the 1st accused was part of the gang of robbers that attacked the accused and in doing so ought to have realized the risk or possibility that death could result from his conduct.

The 2nd accused was found in possession of the HTC phone stolen from the deceased's place. The court disbelieved his denial that he knew nothing about the phone. There would have been no reason for the police to plant the phone on him. The same reasoning is made with respect to the 2nd accused as was made in respect of the 1st accused. The 2nd accused is accordingly guilty on the same basis as the 1st accused namely, a failure to proffer an innocent explanation of the possession of the phone.

The 3rd accused was not found in possession of any of the property stolen from the deceased's residence. However he was identified by the witness Maria Chihuri whom he tormented at length. We were satisfied that we could rely on the evidence of Maria as to the identification of the 3rd respondent. With regards indications which he alleged to have made, the issue is dealt with in the analysis of the 5th accused's reasons for the verdict given in respect of him.

With respect to the 4th accused person there are doubts as to his guilt. He was not in possession of anything to link him to the offence. He cannot be guilty solely on the basis of implication by a co-accused. There are doubts as to whether it would be safe to convict him. He is acquitted.

The 5th accused's position is different. He is said to have led police on indications leading to the recovery of the fire-arm. The indications were however not recorded or placed before the court. Police used high handed tactics and the fact that the accused were assaulted and some shot is common cause. Whether they were assaulted on this or other cases is immaterial. They should not have been assaulted. Illegal means of obtaining evidence makes it difficult for a court to safely rely on such evidence on the mere say so of the police. We were not convinced that there was a fair process of indications or that the indications were freely and voluntarily made. The court cannot rely on them. The accused gets the benefit of doubt. The court's misgivings on the evidence of indications apply equally to the 3rd accused.

Verdict

Having carefully weighed the evidence adduced as a whole in the trial, accused 1, 2, 3 are found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification & Reform Act) [*Chapter 9:23*]. Accused 4 and 5 are found not guilty of the charge and are acquitted.

SENTENCE

The sentencing stage marks the end of this lengthy trial which commenced in 2011 before another judge before the trial *de novo* before this court which started in July, 2016. The trial *de novo* was held for reasons already ventilated in this judgment. The stage of sentencing is not only arduous and onerous for the judge but it is a lonely role. The prerogative to sentence is reposed in the judge alone despite the court being constituted of the judge and the two assessors. The task becomes a one man or woman band and hence a lonely one. Despite the judge being solely responsible for fixing the sentence, he may consult the assessors for their views if the judge considers it fit. The consultation does not however substitute the judges' responsibility to fix the sentence. Assessors are the societal representatives in a criminal trial and in my view, consulting them for their views and input without them usurping the judges' role should be the norm rather than the exception. The assessors have thus been consulted *in casu* but the sentence has been fixed by the judge, (myself) alone.

The prosecutor has submitted that the justice of this case calls for the imposition of the death sentence upon each of the accused persons. The prosecutor has argued that the offence or the murder was committed in the course of a robbery and hence in aggravating circumstances. It is true that the Zimbabwe Constitution (2013) in s 48 (2) allows a court following a murder conviction to impose the death penalty upon the convicted person where it finds that the murder was committed in aggravating circumstances. Seventy year olds and under 21 year olds at the time of the commission of the offence and women are excluded from the penalty or sentence of death.

Sections 42 and 43 of the Criminal Procedure & Evidence Amendment Act No. 2/16 operationalized s 48 (2) of the Constitution and amended ss 336,337 and 338 of the Criminal Procedure and Evidence, [*Chapter 9:07*] which sections deal with the nature of punishments which the court may impose following a criminal conviction including the death sentence for the offence of murder. Act No. 2/16 came into operation on 10 June, 2016. On 24 June, 2016, the General Laws Amendment Act No. 3/2016 was promulgated. It *inter-alia* amended the Criminal Law Codification & Reform Act. Section 8 (2) of Part XX of the said Act amended s 47 (2) and (3) which provided for punishment for murder. The amendment sought to synchronize the penalty provisions for murder with s 48 (2) of the Constitution more particularly by defining without limit, the factors which the court must have regard to in

determining the existence or otherwise of aggravating circumstances in the commission of a murder. One of the factors listed in s 8 (2) of the amendment No. 3/2016 as aforesaid is that it is an aggravatory circumstances where the murder is committed in the course of a robbery. The prosecutor has emphasized this point in this case.

It should however be noted that the fact that an accused person has been convicted of murder in circumstances of aggravation does not bind the court to pass the death sentence. Section 8 (4) of amendment Act 3/16 aforesaid provides that the imposition of the death penalty and other lesser penalties as set out therein is subject to the provisions of ss 337 and 338 of the Criminal Procedure & Evidence Act. Section 337 of the Criminal Procedure & Evidence Act as amended provides that this court “may” pass a death sentence upon the offender where it finds that the murder was committed in aggravating circumstances. Section 338 is an exclusionary provision which spares the classes of persons listed thereon from being sentenced to death whatever the circumstances of the case.

The imposition of the death sentence is therefore permissive in terms of the current law but is not obligatory. The court or judge accordingly has a discretion whether or not to impose a death sentence for a murder committed in aggravating circumstances. What the law giver has done is to list those factors which the court shall regard as aggravating factors without closing and shutting the list of factors. The matrix is therefore complex and the circumstances of each case will ultimately play on the judges mind in deciding whether or not to impose the death penalty. The fact that the law giver has despite listing aggravating factors without closure also still left the decision to impose the death sentence to the discretion of the court or judge is commendable because sentence is best left in the discretion of the sentencer who is then at liberty to consider all the relevant surrounding circumstances as pertain to the offence, the offender and interests of society and to then determine and impose a sentence which in the sentencer’s considered view is fair, just and deserved in any given case.

The next issue which has played on my mind is the determination of the applicability of the legislative provisions which the State referred to and on which I have expanded upon with my comments. The murder which this case is concerned with was committed in 2009 before the enactment of the present constitution and the amendment acts I have referred to. The presumption against retrospectivity of legislation is part of the universally accepted law of interpretation of statutes. Section 17 (1) of the Interpretation Act, [*Chapter 1:01*] recognises the presumption and *inter alia* provides that the repeal of an enactment does not affect any offence created by the repealed enactment nor the penalty provided for it by the

repealed enactment. In short, the old law applies to the offence committed in this case by virtue of the law. Section 18 (9) and 18 (10) of the Sixth Schedule to the Constitution of Zimbabwe (2013) provides that non constitutional cases which were pending before the constitution came into effect may be continued before the court in which the cases were pending or their equivalent under the constitution using the procedure then in force. In terms of s 18 (10) a criminal case is deemed to have commenced when the accused pleaded to the charge. In *casu*, there was a trial *denovo* in which the accused persons tendered their pleas on 4 July, 2016. To the extent that it may be relevant, this trial commenced when both the constitution of Zimbabwe No 13 and the amendment statutes I have referred to were already the law. This notwithstanding however, it must follow from the provisions of s 17 (1) of the Interpretation Act that the old law must be applied.

Before its amendment in 2016, the Criminal Law Codification & Reform Act which was promulgated in 2004 provided as follows in respect of the offence of murder:

“47: Murder

1. Any person who causes the death of another person –
 - (a) Intending to kill the other person; or
 - (b) Realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility;
shall be guilty of murder.
2. Subject to section 337 of the Criminal Procedure & Evidence Act [*Chapter 9:07*], a person convicted of murder shall be sentenced to death unless-
 - (a) the convicted person is under the age of 18 years at the time of the commission of the crime; or
 - (b) the court is of the opinion that there are extenuating circumstances;
in which event the convicted person shall be liable to imprisonment for life or any shorter period.
3. A person convicted of attempted murder or of incitement or conspiracy to commit murder shall be liable to be sentenced to death or to imprisonment for life or any shorter period.”

In terms of the repealed law therefore, the court is obliged to pass the death sentence in this case where all the three accused persons are over 18 years old unless extenuating circumstances are found to be present.

In the case of *R v Mharadzo* 1966 ZLR 240 at 241 G-I a case cited with approval by the Honourable CHIDYUSIKU CJ in *S v Sulili* SC 146/04, BEADLE CJ stated as follows:

“Where, on the evidence, it is possible to do so, I would with respect, suggest that it is desirable for trial courts to make a positive finding on the precise state of mind of the accused, before determining the question of whether or not extenuating circumstances exist because here, this question of the actual state of mind of the accused is, I think, a factor of

considerable importance. I do not wish it to be inferred from this, that, the court must necessarily find that where only a constructive intent to kill is proved, that this court must necessarily find that this is a circumstance of extenuation, but I do suggest that, where only a constructive intent to kill is proved, the court will examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances.”

A regards the approach to determining the existence or otherwise of extenuating circumstances, again in the same *Mharadzo* case (*supra*), which was followed in *S v Jacobs* 1981 ZLR, it was held that:

“There are two permissible approaches to the assessment of extenuating circumstances in murder cases: the first is to make a finding that extenuating circumstances exist if there are any mitigating features in the case; and then to decide whether notwithstanding that finding, the aggravating features necessitate the imposition of the death sentence; the second approach involves balancing at the outset the mitigating against the aggravating features, and, depending on the result, finding that extenuating exist and imposing the death sentence. Both approaches involve a careful weighing up of the mitigating factors against the aggravating factors and the passing of the death sentence only if the latter outweigh the former.” See also *S v Jaure* 2001 (2) ZLR 393 (H).

I observe that it has since been accepted that a finding of a constructive intention as opposed to an actual intention to kill will be properly taken into account together with various other factors upon which a finding of the existence of extenuating circumstances may be made.

The prosecution has submitted that the murder in this case was committed in the course of a robbery and that this constituted a feature of serious aggravation. Counsel for the third accused properly cited the case of *S v Letsolo* 1970 (3) SA 476 (AD) defining extenuating circumstances as being “facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability.”

Before commencing the weighing up process, I have had the benefit of reading the judgments of this court in *S v Malundu* 2015 (1) ZLR 83 (H) by KUDYA J and *S v Emmanuel Dolosi and 3 Ors* HH 210/15 respectively by MWAYERA J. In the *Malundu case*, the accused person committed the murder in 2008. He assaulted the deceased with a button stick resulting in injuries from which the deceased succumbed to his death. The accused was on 23 January, 2015 following his trial which commenced in June, 2011 found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, which verdict equates to murder with constructive intent using the criteria before codification of the criminal law. The learned judge held that whilst s 336 (1) (a) and 337 of the Criminal Procedure and Evidence mandated the imposition of the death penalty in the absence of extenuating circumstances,

“the new constitution in s 48 (2) provided that a law permitting the imposition of the death penalty had to be passed first before the penalty could be imposed. The learned judge reasoned that because such law had not been promulgated, there was a gap in the law, so to speak. The gap had the effect that the court’s hands were tied because the constitution which is the supreme law had changed the playing field and decreed that the death penalty could be passed where a murder was committed in aggravating circumstances. Without such law, the Criminal Procedure and Evidence Act had to be interpreted in conformity with the Constitution so that it was unconstitutional to apply the old criteria of imposing the death sentence in the absence of extenuating circumstances. The learned judge further held that the approach to sentencing in a murder case could simply be one where the court is addressed in mitigation by the accused and in aggravation by the State and the court “determines in the normal way whether aggravating circumstances exist that warrant the death penalty.”

I have already expressed my view on the retrospective aspects of the application of the law and the presumption against it. I have referred to s 18 (9) of the sixth schedule to the Constitution which specifically provide that pending cases before any court before the effective date of the new constitution could be continued before that or equivalent court as if the Constitution had been in force. However, s 18 (9) (a) then provides that the procedure to be followed had to be as was applicable before the effective date of the constitution. I therefore found myself in respectful disagreement with the learned judge to the extent that he may be held to have reasoned that for murder cases which were committed and accused arrested and brought before the court prior to the coming into effect of the new constitution, ss 336 and 337 could not be applied without breaching the constitution where the trials commenced before the promulgation of the new constitution.

In the case of *Emmanuel Dolosi & 3 Ors*, (*supra*), the accused person acting as a gang shot and killed the deceased at Gletnyn Farm, Chishawasha on 2 July, 2010. They appeared before MWAYERA J to answer a murder charge on 2 September, 2013. The trial was protracted and was only concluded on 30 June 2014 with the court indicating that it was expressing a sigh of relief that the trial had come to its end. Notably, there had been delays in its completion caused by varied circumstances. The facts of that case were somewhat similar to the present case in that the accused persons conspired to commit a robbery at a police guarded farm in Gletwyn Chishawasha, Harare and the deceased came into their way whilst they were in the process of executing their unlawful enterprise. One of the gang members shot the deceased dead. They were found guilty of murder on the basis of a common purpose

as is the situation in *casu*. The issue of the ramifications of s 48 (2) of the Constitution did not arise for argument and the court proceeded on the basis of making finding of extenuating circumstances as under the old ss 336 and 337 of the Criminal Procedure & Evidence Act albeit referring to the provisions of s 48 (2) in passing. I am in respectful agreement with the approach adopted by MWAYERA J.

In *casu*, the accused persons went on a sojourn of a preplanned robbery. The deceased's residence was guarded by an armed police detail. The accused persons pounced on the unsuspecting guard at night. They disarmed him, handcuffed him with his handcuffs and severely assaulted him. They proceeded to hold the occupants of the house including the police guard hostage or captive tied with ropes in one of the workers quarters whilst part of their group ransacked the house taking away valuables which included cellphones, money and a motor vehicle. They also stole the guard's A.K rifle and magazine which was loaded. They subjected the occupants of the house to savage attacks and assaults. The deceased was assaulted with the butt of the A.K rifle as he sat on his bed defenceless. Mariah Mandizha who was shepherded into the main house was badly assaulted and lost her teeth in the course of the assault. The ordeal which the occupants were subjected to can only be described as merciless and movie style. The accused persons' gang was armed with a fire arm before they raided the deceased's residence. Some of the victims who included the deceased, the disarmed police guard and Mariah Mandizha had to be hospitalized. Unfortunately the deceased never fully recovered from his injuries and succumbed to them and died.

The accused persons were co-perpetrators together with others. They went to the deceased's premises determined to commit a robbery. They had a common purpose. They were disguised so that their identities would not be easily distinguished. In terms of s 196 of the Criminal Law Codification & Reform Act, the conduct of one co-perpetrator is deemed to be the conduct of each and every other co-perpetrator in the absence of proof of dissociation by the co-perpetrator who seeks to be excused from liability for the actions of a co-perpetrator. It was not argued that any of the accused persons dissociated himself from the actions of the others nor sought to dissuade the others from inflicting the barbaric acts of holding the occupants hostage, attacking them and terrorizing them. *S v Jaure* 2001 (2) ZLR 393 *S v Warosi* 2011 (1) ZLR 215;

Counsel for the 3rd accused submitted that there was no pre-meditation to commit murder and that had the accused planned to kill the deceased, they could have done so because they were armed. The fact that the deceased was not killed outright does not reduce

the moral blameworthiness of the 3rd accused and his co-perpetrators. In terms of s 126 of the Criminal Code, the possession by the accused persons of the fire-arm, its use, the infliction of serious bodily injury on the occupants and subsequent death of the deceased would have qualified the robbery as one committed in aggravating circumstances. In other words the surrounding circumstances of the robbery committed by the accused actually aggravated rather than diminished the moral blameworthiness of the accused persons.

The submission that only three of the accused persons have been convicted and that it would be unfair to punish the three whilst others are scot free is a submission without substance. It would have carried some substance if the accused persons had owned up and sought to minimize their degrees of participation.

It was submitted on behalf of the 2nd accused that from his warned and caution statement, all that he did was to stand guard over the captives in the cottage whilst his co-perpetrators went about committing acts of assault in the main house. The submission does not really make sound legal reasoning. The 2nd accused if he now accepts his involvement was not to blame any less. He made sure that the captured occupants remained captive and would not disturb the execution of the robbery. Robbery is a crime of violence and it would be foolhardy to accept that the 2nd accused would not have foreseen that violence would be perpetrated on whoever was in the main house in as much as it had been perpetrated on the captives whom he stood guard over.

The accused's personal circumstances are just ordinary. They were presented as first offenders who unfortunately started crime on the deep end by committing a very serious and heinous offence which resulted in loss of life. In respect of the three accused, there has been no submission that their personal circumstances are otherwise than ordinary.

It was submitted that there has been a delay in the finalization of this matter and that the accused persons have been in custody since 2009. Indeed there has been a delay of about 7 years. However the delay has not been without explanation. The state timeously brought the accused persons to trial for robbery and subsequently murder. In between, one of the assessors passed on and the accused demanded a fresh trial. There was no indication that they asserted their rights to a speedy trial either. Cognisance is also taken of the fact that there is no prescription for the offence of murder. Whilst pre-trial incarceration is a relevant factor to be taken into account in assessing sentence, the circumstances of every case and the reasons for the delays as well as the attempts made by the accused to have his case dealt with are

relevant considerations. See *S v Banga* 1995 (2) ZLR 297 (s) and *In re Mlambo* 1991 (1) ZLR 399 (5).

Having considered the aggravatory and mitigatory factors and the circumstances of the commission of the offence including the time lapse between the arrest of the accused and the completion of the trial and balancing them, the conclusion which the court has reached is that there are no extenuating circumstances in this matter. Having concluded thus, the court's hands are tied with respect to sentence. It should be mentioned that even if the court were to apply the new criteria of exercising a discretion in respect of sentence where a murder is committed in aggravating circumstances, the balance would in favour of that the aggravating circumstances far outweighing the mitigatory factors.

Having considered what each of the accused has had to say regarding any legal impediments to passing the death sentence and the same submissions having been captured on record, the court finds that they do not preclude it from passing the death sentence. There being an automatic appeal to the Supreme Court which is provided by law, the representations will be considered as well by the Supreme Court and his Excellency the President in the event that the conviction and sentence is upheld by the Supreme Court.

The sentence of the court is therefore that each of the 3 accused is sentenced to death and the three of them will be returned to custody and the death sentence shall be executed upon each of them according to law.

National Prosecuting Authority, for the State
V. S. Nyangulu & Associates, 1st accused's legal practitioners
Ziumbe & Partners, 2nd accused's legal practitioners
Wintertons legal practitioners, 2nd accused's legal practitioners
Makuku Law Firm, 4th accused's legal practitioners
Maphosa, Ndomemene Maramba legal practitioners, 5th accused's legal practitioners