

THE STATE  
versus  
PHIBION MALUNDU

HIGH COURT OF ZIMBABWE  
KUDYA J  
HARARE, 6 & 7 June 2011, 4 June & 14 July 2014, 14, 16 & 23 January 2015

ASSESSORS:           1. Mr P. Chidyausiku  
                              2. Mr S. Shenje

### **Criminal Trial**

*B. Murevanhema*, for the State  
*Mrs W. Kaneta*, for the accused person

KUDYA J: The accused person was charged with the murder of Nyamitumba Saopa who died at Ealing Farm Beatrice on 13 October 2008. He was alleged to have assaulted the deceased with a rubber baton stick resulting in hypovolemic shock, laceration on the spleen and pulmonary haemorrhage from which the deceased died. He denied the charge.

The State called the evidence of two witnesses and produced two documentary exhibits. The two witnesses were Tonderai Kazembera who was employed as a general hand in charge of the tobacco nursery and doubled as a blacksmith at the farm in question and Sergeant Steyn Munovapei, the investigating officer. The two documentary exhibits were the confirmed warned and cautioned statement of the accused, exh 1 and the post mortem report exhibit 2. The trial was delayed by the absence of the forensic pathologist Dr Gonzalez who, at the conclusion of his contract, returned to Cuba, his home country before he could testify. Attempts to call him from his country to testify that were made between 7 June 2011 and 4 June 2014 proved futile. The matter was finalised without the benefit of his oral testimony.

The accused also testified and called the evidence of two witnesses. These were John Gostino, his 29 year old brother-in-law and Chimbilani Njinga a fellow security guard at the farm.

It was common cause that the assaults which led to the death of the deceased took place at the farm workshop interchangeably referred to by the witnesses on both sides of the divide as garage. A basic description of the layout of the workshop was given by Njinga. It is fenced off from the rest of the farm. It is accessed through a gate separate from the main farm gate. It consists of sections housing farm equipment and tractors and an office. John Gostino stated that the area outside the workshop was lit by a tower light. His version was contrary to the uncontroverted testimony of Kazembera that a fluorescent lamp lit inside the workshop.

The accused was the head of security at Ealing farm. Aleck Mlambo who was and remains a fugitive from justice from the time the trial commenced, worked under him. The deceased was an ordinary farm worker at the farm in question. Some irrigation pipes were stolen from the farm. Owen Masocha, an employee at the farm was arrested for the theft by farm guards. Before his arrest he had taken some of the pipes to Tonderai Kazembera to forge pots for him. Kazembera declined to do so and Masocha left with the pipes. The deceased was also apprehended on suspicion of the theft of the pipes. He was taken from the fields to the farm workshop for questioning at around 10 pm on 12 October 2008. He was detained and beaten at the workshop until he died at around 4 am on 13 October 2008.

The evidence of Tonderai was that the deceased was interchangeably beaten by both the accused and Aleck Mlambo indiscriminately in the workshop veranda and outside that veranda in the dark. Tonderai stated that he was summoned from his house to the farm workshop by the accused at 10 pm on 12 October 2008 for questioning. On arrival, he found Isaac Gunya, Owen Masocha, Murambiwa, Chatonga, Ernest Mangoti and Aleck in the company of the deceased and the accused. Owen was handcuffed behind his back to a pole. The deceased was seated in the veranda. He was weak and in tears from which he concluded that he must have been assaulted before his arrival. Tonderai identified the pipes in the workshop as the ones Owen Masocha had earlier brought to him to forge pots. His story must have been similar to the one Owen had given in his absence for he was absolved of any wrongdoing by the accused. He was however detained at the workshop until 5am when he left for the tobacco nursery.

At the workshop, the accused and Aleck took turns to indiscriminately hit the deceased on his buttocks and back with a rubber baton stick about 50cm long. The accused dragged the deceased from the veranda into a dark spot from where the howls and cries of innocence of the deceased were ignored as accused belaboured him in a bid to extract a confession from him. Aleck went after them in a bid to restrain the accused from assaulting

the deceased. Later the accused and Aleck carried the deceased, who was now unable to walk on his own, back to the veranda. The witness was released from the workshop by the accused at 5am. He proceeded to the tobacco nursery from where he received the news of the demise of the deceased. He failed to identify the baton stick in court with the assault weapon used on the deceased.

He was cross examined by accused's counsel. He maintained his testimony that he found deceased seated in the veranda when he reached the workshop. He disputed the contents of his statement to the police of 16 December 2008 to the effect that the deceased was brought to the veranda when the witness was already at the workshop. He disputed the contents in his statement that he left the workshop at the time the deceased was crying out in the dark. He again disputed the contents of his statement that Gunya told him that deceased had died at 4am. He maintained that Aleck followed the accused outside the workshop in order to restrain him from assaulting the deceased. He was not present when the deceased allegedly attempted to escape from the workshop and was for his efforts assaulted under his feet by Aleck and all over his body by Jonathan Gijima. He denied that some of the pipes were recovered from his house. They were recovered from the bush where Owen had hidden them. He maintained contrary to the accused's version that he was present at the workshop in response to the accused's summons.

We found the witness a credible witness. In our view his denials of some of the contents of the statement to the police of 16 December 2008 did not dent his credibility. His evidence in chief and his responses under cross examination clearly demonstrated that he went to the workshop at 10 pm after the deceased's arrest. According to Njinga, the deceased was taken to the workshop around 7pm by Aleck Mlambo, Jonathan Gijima and Isaac Gunya under a barrage of blows. That Tonderai was summoned to the workshop after 10pm accords with the probabilities. In his testimony, the accused stated that he was called from his house by Isaac Gunya and went to the workshop at 10pm. It was while he was present that he alleged that Owen Masocha confessed leaving some pipes with Tonderai, which he allegedly recovered from Tonderai's home. Any head of security worth his salt in the shoes of the accused would naturally wish to question Tonderai as a possible suspect. Secondly, whether he left during the deceased's cries in the dark or not did not detract from the assaults he saw. He did not attribute any further assaults to the deceased after carrying the deceased back into the workshop from the dark. Lastly, that he was told the deceased had died at 4am when he was already at the nursery did not dent his evidence that he left the deceased lying on the

ground at around 5 am. In our view the discrepancies are immaterial and do not affect the probative value of his overall testimony.

Sergeant Steyn Munovapei, the investigating officer was assigned the matter at 10am on 13 October 2008. Constable Advance Sakonda from the Marirangwe police base brought accused and Aleck to him. He had a 50cm long black baton stick. He warned and cautioned the two suspects in the presence of Constable Chipfurutse and recorded their respective warned and cautioned statements in the crime investigations office. He further warned and cautioned the two suspects and proceeded with Sakonda to the scene of crime for indications. The accused identified a spot inside and another outside the workshop where the assault on the deceased took place. The deceased lay on the floor in the workshop covered by a blanket. He uncovered the blanket and pulled the shirt of the deceased up. The body was swollen. He observed weals on the back, buttocks, biceps and triceps of both arms.

The accused and Aleck were taken to the Beatrice circuit court the following day by a constable and the witness followed. He was seated in court when the accused's matter was called. The confirmation proceedings were held in camera and in the absence of the investigating officer. After the proceedings the accused was taken into prison custody and conveyed to remand prison. He only became aware that he was legally represented during his indictment for trial at Chitungwiza magistrates' court. He identified exhibit 1 as the confirmed warned and cautioned statement he recorded from the accused person. He recorded it first in long hand on 13 October 2008 before typing it out the following day. The accused responded thus:

"I do admit that on the 12<sup>th</sup> day of October 2008 at about 2200 hours during the night I assaulted the now deceased with a baton stick several times which led to his death on 13<sup>th</sup> day of October 2008 at 0400 hours in the morning. The reason why I assaulted the now deceased was to recover the irrigation pipes he had stolen from the fields. I ordered the now deceased to lie down on his stomach and assaulted him several times on his buttocks using a baton stick. Whilst assaulting the now deceased, he complained that he was not feeling well and I stopped assaulting him. I took him to a nearby fireplace to warm him since he was complaining of fever. The now deceased sat beside the fireplace for a long time before sleeping awaiting dawn. The now deceased slept near the fire and I also slept at the opposite side of the fireplace. At around 0400 hours, on 13<sup>th</sup> day of October 2008 I woke up and discovered that Nyamitumba Saopa had died. That is all."

Signed by accused. Recorded by the witness Sergeant Munovapei and witnessed by Constable Chipfurutse signed dated 14 October 2008.

He was crossed examined. He went for indications in the vehicle that had conveyed the accused and Sakonda to the police station. He scrutinised the whole body and observed “scars” (weals) left by the weapon. He did not see any herpes marks; he in fact was not aware what such marks look like. He did not observe any fresh and weeping wounds on the abdomen and back of the deceased.

He disputed the averment that he never took accused for indications but let him sit out Aleck’s indications in the workshop. He took the accused for indications first. The accused indicated the place in and outside the workshop where accused hit deceased and fireplace he died warming himself and where accused, Aleck and Isaac Gunya carried the body to where it lay in the workshop. He confessed he hit him all over the body in order to extract a confession and location of the stolen pipes. He denied that a mob wanted to hit the accused at the farm. The pipes stolen by Owen were recovered. Those allegedly stolen by the deceased were not recovered. It was alleged the two had stolen the pipes from two different sites on the farm. He took Aleck for indications soon after the accused. Aleck confessed he started hitting deceased under his feet with a baton stick outside the workshop. He in turn took Isaac Gunya and Tonderai Kazembera for indications. He was not aware that accused was assaulted by plain clothes policemen at 2 am. He never used force or threats of any kind on the accused to induce him to sign his statement. He read back to him the computer typed statement. The accused was most cooperative from the time he was handed to him, recorded statements and referred him to court. He was not aware of the events at Marirangwe [that arrested as head of security for report death at hands of Aleck] but at Beatrice accused admitted to assaulting the deceased. He was taken to court with other suspects by three policemen. The witness followed at court to provide clarifications to the public prosecutor before commencement of proceedings and not to intimidate the accused. After all the accused was co-operative and admitted to assaulting the deceased. Tonderai was never a suspect as he was exonerated by Owen.

He was adamant that other than the court orderly no other policemen remained in court during confirmation proceedings. He was unaware that the accused was detained at Beatrice police holding cells for three days awaiting transport to remand prison.

In her oral submissions before us counsel for the accused asked us to disregard the witness’ evidence on the basis that the warned and cautioned that he recorded was induced by force by other policemen other than the investigating officer. We do not share her views. The statement was recorded in long hand on the day the accused and Alec were brought to the

police station, before they had spent the night there. Any alleged happenings during the dark after it had been recorded would not have any bearing on what had already been said. The contents of the statement of the accused and indeed of Aleck as put to the accused under cross examination demonstrate minimal admission of wrong doing in comparison to the overall injuries inflicted on the deceased. The accused limited admission to assaults on the buttocks and intimated acts of kindness and compassion towards the deceased when he complained of fever and ill-health while Aleck minimised the assaults he inflicted to four under the feet of the deceased. If the police were the author of the confirmed warned and cautioned statement we would expect to see full admission of the assaults on all the parts of the body observed by the investigating officer and confirmed in the post mortem report. We are satisfied that the accused gave his statement freely and voluntarily. The manner of confirmation of the statement was only impugned in meaningful detail during the evidence in chief of the accused. Had that been clearly set out in the defence outline, we would have called the confirming magistrate to testify on the procedure he adopted in confirming the warned and cautioned statement. We are satisfied that the investigating officer conducted himself in a professional manner in his interactions with the accused.

The production of the post mortem report was opposed on 7 June 2011 on the basis that the pathologist had failed to record any herpes symptoms that should have been apparent on a casual physical observation of the deceased body such as weeping and watery lesions, poor health, and emaciated body. Attempts to use diplomatic channels to have the pathologist Dr Gonzalez called failed to bear fruit. The matter resumed on 4 June 2014. The Cuban doctor was absent. The post mortem report was produced by consent as exh 2. In terms of s 278 (5) as read with subs (11) and (12) of the Criminal Procedure and Evidence Act [*Cap 9:07*] as correctly interpreted by BHUNU J in *S v Tawana Michael Mhute* HH 12/2012 at p 8 of the cyclostyled judgment once it is demonstrated that the post mortem report was made by the person who carried out the examination in the course of his or her duties and that the accused was afforded at least three days' notice, the report may be produced in evidence in the face of the accused's objections as long as any party including the court is permitted to call any other expert to explain the contents of the affidavit and answer any relevant questions concerning the meaning of medical terms used and conclusions reached from the observed facts or allegedly omitted facts. The accused chose not to call such an expert other than the maker to clarify whatever misgivings he had with the contents of the post mortem report. In fact in her oral submissions counsel for the accused accepted the contents in full but

averred that as the accused had not assaulted the deceased, they did not apply to or implicate him.

The pathologist examined the remains of the 42 year old well-nourished deceased on 22 October 2008 for 30 minutes. An external examination revealed clothes with grass, pale cuticle, bleeding from the mouth, multiple bruises on both arms and hands, chest, abdomen, face and head. He did not conduct an internal examination of the head, skull and brain. He however conducted an internal examination of the thorax and observed approximately 2 litres of blood in the chest cavity, rib fractures, and both left and right lungs had extended pulmonary haemorrhage. The abdomen had blood in the cavity, there was a laceration on the spleen. The large and small intestine, liver and gall bladder, pancreas and suprarenals, spleen, kidneys and bladder were pale with signs of shock. He concluded that death was caused by hypovolemic shock, laceration of the spleen and pulmonary haemorrhage secondary to assault.

We are satisfied that the pathologist conducted a thorough investigation of the body. The post mortem report established beyond a reasonable doubt that death was a direct result of the protracted assault perpetrated on the deceased by whoever participated in the assault orgy of 12 October 2008.

The accused denied the charge. He received a report at his residence at 7pm from the farm manager Mr Kadyauswa. He accompanied the farm manager to where Owen Masocha was. Owen made a report to them. They took him to the small office in the workshop. He left him with his deputy Isaac Gunya and went to his house. At 10pm Gunya came and made a report to him. He went with him to the workshop where he saw the deceased whom he knew as Wellington Saopa held at a separate spot in the workshop from Masocha. Saopa protested his innocence. The accused proceeded to question Masocha. He went to Tonderai's house and recovered some pipes. He did not speak to Tonderai who must have been at the tobacco seed beds some 300m from the workshop where he commenced duty at 8pm. He took the pipes to the workshop to Masocha.

While conversing with Masocha, he saw Aleck Mlambo and Jonathan Gijima assaulting Wellington Saopa and in the process generating commotion and screams from the deceased. The deceased was crying. Aleck was using a baton stick to belabour the deceased who lay on his stomach on the ground while Jonathan was stamping him with his feet. He stopped the two from assaulting the deceased whom the accused knew was of ill health. He was a herpes patient who used to share a broad spectrum drug cotrimoxazole with the

witness. At 11pm he left Aleck and Jonathan guarding the deceased whilst he and Isaac went for patrol where they remained until 5.30am. He observed Aleck outside the workshop by the fire. Jonathan had deserted his post. He proceeded to shake deceased awake but discovered that he was dead. Isaac joined him and they carried the deceased to the spot inside the workshop where the police found him covered by a blanket. He made a report to the manager and farm owner. He went in a farm vehicle to Marirangwe police base and made a report against Aleck and Jonathan-the latter in absentia. He handed the baton stick used by Aleck to assault the deceased to Constable Sakonda. Instead he and Aleck were locked up and assaulted by Constable Sakonda for killing the deceased. Sakonda took them back to the farm in handcuffs. He left the two in the vehicle and went to the scene and later ferried the accused and Alec to Beatrice police station where the two were assaulted by plainclothes policemen to admit murdering the deceased. At the same time the uniformed policemen questioned him while Munovapei typed out his responses. The two suspects were held in police cells. The following morning they were asked to sign statements before they were taken to court. He did not read the statement. He identified exh 1 as the statement he signed. He, however, denied the entire contents of the confirmed warned and cautioned statement, as having emanated from him.

He was taken to court. The police who hit him sat in the gallery in plain clothes. In fear he simply admitted the contents to the confirming magistrate. After the confirmation he raised his hand to engage the magistrate who told him to reserve his concerns for his lawyer who was on her way to see him. Instead of being taken to prison he was detained at Beatrice police cells awaiting collection by prisons.

It was not clear to us why counsel for the accused objected to the production of the baton stick used to assault the deceased when the accused conceded in cross examination that he had handed it to Sakonda who in turn had taken it to the investigating officer at Beatrice police station. He disputed that Tonderai was ever at the workshop at all material times that the deceased was assaulted. He could not dispute that the deceased died from the multiple injuries observed and noted by the forensic pathologist in exh 2. He denied assaulting the deceased averring it was contrary to his duties as a security officer. While he stated that he was under a barrage of blows from plain clothes policemen when the investigating officer was recording his warned and cautioned statement, these allegations were never canvassed with the investigating officer by his counsel during cross examination. He averred that he was taken from Beatrice police cells the following day to Chitungwiza police station contrary to



his earlier version that he was detained at Beatrice for three days after remand into prison custody. He agreed with the confirmed warned and cautioned statement of Aleck that was read to him in cross examination. It was to the effect that Aleck only hit the deceased four times under his feet after the deceased had received several blows on his buttocks from the accused, and that he was awakened by accused at 4am on 13 October 2008 and advised of deceased's death.

We found the accused an incredible witness who went to great lengths to resile from his confirmed warned and cautioned statement. He falsely claimed protracted police brutality from Marirangwe police base to Beatrice police station. Yet he did not complain of such assaults to the confirming magistrate or even to his own counsel the following day. One would have expected his counsel to have made arrangements for medical examination of the accused at the time to crystallize any injuries, he may have sustained from such assaults. In our view the accused is given to hyperbole and was completely untruthful on the manner in which his confirmed warned and cautioned statement was recorded. It was strange that he would admit to the accuracy of the contents of Aleck's warned and cautioned statement put to him by state counsel in which Aleck alleged that he had assaulted the deceased under his feet with a baton stick after he had been assaulted several times by the accused on his buttocks.

We did not believe John Gostino's testimony. It differed with that of the accused in one material respect. He averred that the accused was called to the workshop by Aleck. The accused stated that at 7pm he was approached at his house by the farm manager who took him to Owen Masocha. The accused further stated that he was called to the workshop at 10pm by Isaac Gunya. While it was clear that Aleck and Jonathan also assaulted the deceased as Gostino averred, in our view he exonerated the accused on grounds of his marital relationship with him. His version that he was able to see the accused emerge from the workshop office was contradicted by the last defence witness Njinga who testified that Gostino's view was blocked and he could not observe the workshop office from where he stood. We did not find Gostino a truthful witness.

The last defence witness Chimbilani Njinga was on 12 October 2008 manning the main farm entrance, some 150m away from the workshop. Three security guards entered through the entrance soon after 7pm with the deceased. They were slapping him to extract a confession from him about the whereabouts of the irrigation pipes. He followed them to the workshop after an hour and some minutes. At the workshop he saw accused was in an office with Owen Masocha questioning him. Aleck was hitting the suspect with a baton stick and

the suspect was rolling on the ground. Gijima used his hands to assault the suspect. A visitor John was standing close to the witness. Accused emerged from the office after the witness had been at the workshop for 30 minutes attracted by the cries emanating from the deceased and asked why the security guards were assaulting him when they knew he was of ill health. The suspect was questioned for a long time before he was left in the custody of Aleck and Jonathan. Isaac and accused left for farm patrols and witness returned to his station. He basically confirmed the accused's version of events.

We, however, did not believe that he witnessed the events that took place at the workshop. His version places him at the workshop before 9pm. He saw accused questioning Owen Masocha. Accused's version was that he questioned Owen around 7pm. Thereafter he went home and only returned to the workshop around 10pm after Isaac Gunya called him. Njinga's testimony contradicted that of accused in regards to when the deceased was collected from the fields to the farm workshop. It could be that he witnessed the arrival of Owen Masocha at 7pm and whatever he described related to Masocha and the accused before Tonderai appeared on the scene. It seems to us he was called by the accused to falsely exonerate him from the assault and to deny the presence of Tonderai at the workshop at the material time.

The test to be applied in determining whether the accused's version is substantially true was set out succinctly by GREENBERG JA in *R v Difford* 1937 AD 370. At 373, the learned judge of appeal stated that:

"... no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal ..."

See also *S v Dube* 1997 (1) ZLR 229 (H) at 238D and *S v Manyika* HH 215/2002 at page 2 of the cyclostyled judgment;

We find that the inconsistencies in the accused's version and as between the accused and his witnesses call for adverse conclusion that his defence cannot reasonably possibly be true. We therefore accept the evidence adduced by the State witnesses as against that of the accused and his witnesses as the truth of what transpired on the fateful night and subsequent days.

We are satisfied that the State proved beyond a reasonable doubt that the accused participated in the indiscriminate assault of the deceased all over his body. He was the head

of security at the farm. He did not stop his juniors from assaulting the deceased. Rather he was at the forefront of inflicting the injuries observed by the investigating officer and confirmed and recorded in the post mortem report by the forensic pathologist in exhibit 2. The conclusions of the pathologist on the cause of death are consistent with the proven facts of the injuries found on the deceased's body. See *Levy v Tune-O-Mizer Centre (Pvt) Ltd* 1993 (2) ZLR 378 (S) at 381A where KORSAH JA stated that

“However, before receiving such expert opinion in evidence, the facts which he relies to form that opinion must themselves be proved in the trial by admissible evidence.”

His participation is not only based on his confession that he made freely and voluntarily but also on the credible evidence of a percipient witness Tonderai. In addition it is a proven fact that the deceased was assaulted, even by accused's own evidence by among other weapons, a baton stick which he handed over to Constable Sakonda. The contents of the post mortem report is evidence *aliunde* that the deceased died from the vicious assault on his person. Unlike in *S v Shonhiwa* 1987 (1) ZLR 215 (SC) at 218 B where the cornerstone of the State case was the confirmed warned and cautioned statement, the evidence of Tonderai and the post mortem report confirm the extent of the accused's participation in the assault that caused death. In *S v Taputsa* 1966 RLR 662 (A) at 667E LEWIS JA said that:

“The effect of s 301(2) seems to be that, where there is evidence *aliunde* proving that the offence has actually been committed the court may satisfy itself of the genuineness of the confession by the accused that he committed it or took part in it from the nature of the confession itself; where, however, there is no evidence *aliunde* proving that the offence itself has been committed, the court must, in addition, go outside the confession and be satisfied that it is confirmed by other evidence. In the leading case of *R v Blythe* 1940 AD 354, TINDALL JA delivering the judgment of the Full Bench of the Appellate Division, laid down that the confirming evidence required by the statute must be such as to corroborate the confession 'in a material respect', although it need not directly implicate the accused in the offence, and that the statutory requirement, in this regard, was similar to that in respect of an accomplice, as explained by SOLOMON ACJ in *R v Lakatula* 1919 AD 362. In *Lakatula's* case, it was said that there should be corroboration in some material respect, 'in order that the jury may be satisfied that the accomplice is a reliable witness upon whose evidence they may safely act.' (See also *R v Troskie* 1920 AD 466 at 468, per INNES CJ).

Applying this test to confessions, it seems that the confirming evidence need not amount to evidence directly confirming that part of the confession in which the accused actually implicates himself in the commission of the offence; it need only be evidence which is sufficiently corroborative of a material part or parts of the confession to satisfy the court that it can safely rely on the confession as a whole in convicting the accused."

In our view both the intrinsic test arising from the contents and nature of the confession itself and the extrinsic test emanating from external evidence were satisfied. The genuineness of the confession is intrinsically demonstrated by the attempt to minimize the area the accused directed his blows and his purported acts of kindness and compassion and extrinsically by the other evidence already referred to of Tonderai and the post mortem report.

Murder is defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [Cap 9:23] as follows:

**“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.”

Para (a) above covers actual intention while para (b) covers legal intention. The correct interpretation of this section is found in *S v Mugwanda* 2002 (1) ZLR 574(S) at 581D-F where actual intention and legal intention to kill are explained. CHIDYAUSIKU CJ stated that:

“On the basis of the above authorities, it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that:

- a. Either the accused desired to bring about the death of his victim and succeeding in completing his purpose; or
- b. While pursuing another objective foresees the death of his victim as a substantial certain result of that activity and proceeds regardless.

On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain; making this a question of degree more than anything else.)”

We agree with State counsel that the accused lacked actual intent to kill in both its ramifications. We are satisfied that he must have realised the existence of a real risk that his conduct could cause death but nonetheless persisted in that conduct. We are satisfied of this from the nature of weapon used. It was a 50cm long rubber baton stick. He used it to indiscriminately inflict injury upon the well-nourished deceased, with others, until the deceased could not walk. The result of his handiwork left fatal injuries on the deceased in the form of fractured ribs, lacerated spleen, pulmonary haemorrhage which resulted in hypovolemic shock that triggered death. The assault was persistent, protracted and vicious.

He must have foreseen that death could result but was reckless as to whether or not it did as he mercilessly assaulted the deceased.

Accordingly, we return a verdict of guilty of murder with constructive intent in terms of s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]

### SENTENCE

Section 48 of the Constitution of Zimbabwe provides for the right to life to every person. Subsection (2) thereof states:

“(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and  
(a) the law must permit the court a discretion whether or not to impose the penalty;”

The contemplated law that complies with this constitutional provision is not yet in place. Part XVIII of the Criminal Procedure and Evidence Act [*Cap 9:07*] comprehensively deals with the punishments that may be imposed for all criminal offences in Zimbabwe. Section 336 (1) (a) empowers the High Court to impose the death penalty. Section 337 mandated the imposition of the death penalty in the absence of extenuating circumstances.

There was recognisable distinction in our law and practice between extenuating circumstances and aggravating features before the new constitutional dispensation. The cases of *S v Jacob* 1981 ZLR 1 (S), *S v Mutsunge & Anor* 1987 (1) ZLR 53 (S) and *S v Tshuma* 1991 (1) ZLR 166 (S) underline the distinction and may throw light on the meaning of the present constitutional provision.

My view is that until a law contemplated by the constitution is promulgated, the Criminal Procedure and Evidence Act, *supra*, must be interpreted in conformity with the constitution. The effect of such an interpretation is that extenuation is no longer a requirement and the death penalty is no longer mandatory. It may only be imposed where the sentencing court finds that the murder was committed in aggravating circumstances. The procedure envisaged may very well be along the lines intimated by EBRAHIM JA in *S v Tshuma*, *supra* at p 170B. The court is addressed in mitigation by the accused, followed by aggravation by the State and thereafter the court determines in the normal way whether aggravating circumstances that warrant death exist. This appears to have been the approach adopted by HUNGWE J in *S v Mutsinze* HH 645/2014. It is the approach that commended itself in the present matter.

In arriving at the appropriate sentence, I took into account the personal circumstances, social and health status of the accused as outlined by his counsel. He is a 49 year old first offender with a wife and two minor children who look up to him for sustenance. He also supports his elderly and blind mother and three nieces and nephews. He is the sole breadwinner. He was employed as the head of security at the farm in question. He will lose his job as a result of the conviction. He is of ill health. The case has been pending for the past 6 years. Even though he was on bail, he suffered the agony and anxiety associated with criminal trials while awaiting the conclusion of this matter. All these constitute mitigation. In aggravation, he killed a fellow employee and breadwinner with two others who are at large. He abused his position of authority over the deceased. The assault which resulted in death was brutal and callous. It was inflicted on a defenceless deceased whom he suspected of theft of irrigation pipes. He took the law into his own hands. He used a rubber baton stick. His duty after apprehending the deceased was to hand him over to law enforcement agents for investigation. He did not protect the deceased from harm.

The circumstances in which the crime was committed and the nature of the crime far outweigh the mitigatory features advanced by the accused. The aggravating features found do not, however, call for the imposition of the death penalty. The appropriate sentence, in line with precedent, for a conviction of murder with constructive intent is a term of imprisonment. See *S v Sibanda* HB 30/2013, a culpable homicide conviction, where a 39 year old son who killed his mother with a brick was sentenced to 8 years imprisonment and *S v Gatsi* SC 37/1990 where a wife who poisoned her husband in retaliation of a brutal assault perpetrated on her was on appeal found guilty of murder with constructive intent and sentenced to 8 years imprisonment. Society looks up to the courts for the protection of the sanctity of life.

The appropriate sentence that reflects society's disapproval of his actions but takes into account his mitigation is one of 10 years imprisonment.

*Prosecutor General's Office*, State legal practitioners  
*WOM Simango & Associates*, Accused's legal practitioners